Supreme Court, U.S.
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No. 01-___

IN THE

# Supreme Court of the United States

COMMONWEALTH EDISON CO.,
*Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether the *en banc* Federal Circuit erred in adopting, in acknowledged conflict with other circuits, a *per se* test that avowedly immunizes even "severely retroactive" governmental exactions from constitutional challenge, and that accords no weight to such important factors as: the period of retroactivity, the amount of the exaction, the assessed party's comparative responsibility, the government's own commercial self-interest in imposing the assessment, or the expectations created by the assessed parties' contracts with the government.

2. Whether the wholly retroactive assessment at issue in this case, which requires private parties to pay $2.25 billion based on transactions dating back to 1959, and which the government adopted with the avowed purpose of increasing the sales price of a commercial enterprise it was simultaneously divesting, violates the Takings or Due Process Clauses.

3. Whether certiorari should be granted to review the Federal Circuit's articulation and application of the "sovereign acts" and "unmistakability" doctrines.

## RULE 29.6 STATEMENT

Exelon Corporation is the parent corporation of Petitioner Commonwealth Edison Company. No other publicly held company owns ten percent or more of Petitioner's stock.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Commonwealth Edison Company respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

## OPINIONS BELOW

The Federal Circuit's *en banc* opinion (Pet. App. 1a-52a) is reported at 271 F.3d 1327. The opinion of the Court of Federal Claims dismissing Commonwealth Edison's complaint (Pet. App. 81a-101a) is reported at 46 Fed. Cl. 29 (1999).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Appendix (at 155a-174a) reproduces relevant provisions of Titles IX, X, and XI of the Energy Policy Act of 1992, P.L. 102-486 (Oct. 24, 1992) ("EPACT").

## JURISDICTION

The Federal Circuit entered its opinion on November 20, 2001. On February 12, 2002, the Chief Justice extended the time to file this Petition to and including March 20, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## STATEMENT

**I. Background.** This case arises from the single largest, and most "severely retroactive" (Pet. App. 31a) governmental exaction of money in this Nation's history. Starting in 1945, the government built and began operating uranium enrichment plants. Until 1969, the government dedicated its plants almost exclusively to supporting military programs. *Id.* 3a. The government began making commercial sales of enriched

uranium in 1969, after Congress amended the Atomic Energy Act of 1954 ("AEA") to permit that practice.[1]

Regarding commercial sales, Congress directed the Atomic Energy Commission ("AEC") to "establish criteria in writing setting forth the terms and conditions" and to submit those criteria, and any changes thereto, for congressional approval. AEA § 161(v). The AEC and its successor agencies, including the Department of Energy ("DOE"), promulgated detailed "standard" contracts for private utilities based upon the published criteria. The contracts required customers to furnish unenriched uranium ("feed material") to the government. The government accepted title to this material and subsequently produced and delivered enriched uranium. Court of Appeals Supplemental Appendix ("A.S.A.") 2-4. From the outset, the contracts provided that customers would pay fixed prices, based upon published rates, for government-enriched uranium. Court of Appeals Joint Appendix ("J.A.") 526, ¶ 26; Pet. App. 4a-5a.

It is undisputed that, at all times, the government had complete dominion over and full responsibility for operation of its plants, storage of uranium in its possession, and disposal of waste material generated by the enrichment process. J.A. 525.[2] The contracts specified that customers assumed title (and, therefore, responsibility for) enriched uranium they purchased only after delivery of the material by the government. A.S.A. 206. Nothing in the contracts (or underlying regulations) indicated that purchasing the services could subsequently render the customer responsible for anything other than paying the contractually specified price. J.A. 541.

The government dominated the uranium enrichment market until the late 1970s, when viable foreign competition emerged.

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[1] See Private Ownership of Special Nuclear Materials Act, Pub. L. No. 88-489, 78 Stat. 602 (1964). Previously, the government "leased" small quantities of low-enriched uranium to some civilians. Court of Appeals Joint Appendix 524-25.

[2] The contracts specified that the government would maintain ownership over residual materials produced by the process – such as depleted uranium or "tails." J.A. 61.

J.A. 532. The government soon became "the world's highest-priced supplier of enrichment services," however, and its market share plummeted. *Id.* 585, 532-533. DOE responded by developing a new contract and launching an "extensive marketing campaign" to induce Petitioner (and other utilities) to remain customers. *Id.* 533; A.S.A. 59, ¶ 23. DOE offered more flexible terms, lower pricing (including a "double price guarantee," (A.S.A. 61)), promises that prices would be controlled in the future, and representations by high-ranking government officials that the prices specified represented the full amounts utilities would be obligated to pay for the services. J.A. 533; A.S.A. 60-64.

Between 1959 and 1992 (and principally after 1969), Petitioner purchased approximately 14 million "separative work units" ("SWUs") – the relevant measure under the contracts – of government enrichment services. J.A. 531. It is undisputed that, in reliance on the fixed-price nature of the enrichment contracts and the government's representations regarding all-inclusive pricing, Petitioner bypassed opportunities to purchase enriched uranium from other sources.

**II. EPACT's Imposition of Retroactive Liability.** In 1992, the government's share of the market dwindled further and DOE lobbied Congress to exit the business. J.A. 536-37. The government's exit strategy turned on creation of a government-owned corporation, the United States Enrichment Corporation ("USEC"), which would perform enrichment services on a "profitable and efficient basis" in order to "maximize the long-term value of the Corporation to the Treasury," followed by the sale of the enterprise to private investors. 42 U.S.C. 2297c-2(d), 2297c-5, *repealed by* USEC Privatization Act, 42 U.S.C. 2297h-5(d). The government had long recognized that it would ultimately be required to decontaminate and decommission ("D&D") its enrichment plants, which had become heavily contaminated while dedicated to military programs. J.A. 524-25.[3] Recognizing that liability

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[3] Indeed, a DOE-sponsored study plainly concluded that "[i]n 1969, when commercial production began the [enrichment] plants were already

for decontaminating and decommissioning expenses would depress USEC's sales price and hence substantially reduce the profits to the U.S. Treasury, the government essentially transferred the assets of its enrichment business to USEC but retained liability for environmental remediation. J.A. 537-38. See generally H.R. Rep. No. 102-474, Part 2, *reprinted in* 1992 U.S.C.C.A.N. 2064 (1992). Pursuant to this arrangement, the government sold USEC to private investors in 1998 for *$1.4 billion*. James K. Glassman, *The Inside Scoop*, WASH. POST, Aug. 30, 1998, at H1.

The government established a Decontamination and Decommissioning Fund ("D&D Fund") to finance its clean-up responsibility. See 42 U.S.C. 2297g-1 *et seq.*; 10 C.F.R. 766.1 *et seq.* The D&D Fund was also designed to defray other expenses unrelated to the government's operation of the enrichment plants. Most significantly, EPACT allocated up to $310 million to clean up *privately owned and operated* thorium and uranium production facilities. 42 U.S.C. 2296a (1992). This amount has been periodically increased, so that up to *$490 million* of the D&D Fund may now be allocated to clean up private facilities that have no nexus whatsoever to the uranium enrichment contracts. Pub. L. No. 105-388, § 11(a).[4]

To help finance the D&D Fund, Congress imposed a "special assessment" of up to $150 million per year (adjusted for inflation) on "domestic utilities" that had purchased government-enriched uranium. 42 U.S.C. § 2297g-1(c) to -(e). Several features of the assessments are particularly noteworthy:

• The assessments are wholly retroactive: each utility's share is based on the amount of government-enriched uranium

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contaminated and the need to conduct D&D was well established." A.S.A. 282. And "the level of decontamination effort required for process buildings [was] *no greater* [in 1992] than the effort that would have been required in 1965 if all the facilities had been required to have been decommissioned at that time." *Id.* 281.

[4] The $75 million figure cited by the opinion below (Pet. App. 33a n.19) is misleading because it represents only expenditures to date.

acquired before October 24, 1992.[5] *Id.* Petitioner is assessed for transactions made as early as 1960 (J.A. 519), and liability potentially attaches for other utilities to transactions dating back to the inception of the plants in 1945.

- The assessments are massive: they are payable annually for fifteen years and will ultimately impose liability of $2.25 billion. Petitioner has thus far paid more than $140 million in D&D Fund assessments and its total liability will exceed $235 million. J.A. 45, 539-40.

- Liability is imposed notwithstanding that utilities were *not* substantially responsible for increasing the costs of environmental remediation. As the government explicitly acknowledged below, the "assessments are *not* premised upon any responsibility [by the utilities] for contamination" at the government's enrichment facilities (Gov't C.A. Br. 31 (emphasis added)). Indeed, the plants were contaminated long before the commercial sales program began. J.A. 525.

**III. The Proceedings Below.** Petitioner's amended Court of Federal Claims complaint asserts that the retroactive D&D Fund assessment: (1) constitutes an unlawful taking; (2) violates due process; and (3) breaches the fixed-price terms of its contracts with the government. J.A. 517-553. The court granted the government's motion to dismiss the complaint for failure to state a claim. See Pet. App. 81a-124a. The Federal Circuit *sua sponte* ordered the case heard *en banc* and ultimately affirmed by a divided vote. See *id.* 1a-52a.

Preliminarily, the Federal Circuit held that the Court of Federal Claims has *exclusive* trial jurisdiction, and that the Federal Circuit thus has exclusive appellate jurisdiction, over the

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[5] Eighty-five percent of utilities' acquisitions were made directly from the government. Utilities also obtained material through "secondary market" transactions in which utilities transferred their contractual right to receive government-enriched uranium to other parties. EPACT imposes the assessment on the ultimate purchaser. See 10 C.F.R. 766.101.

great majority of challenges to retroactive federal exactions. See Pet. App. 15a.[6]

Addressing the merits, the *en banc* majority first rejected out of hand Petitioner's claim under the Takings Clause, invoking the view of five Justices in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), that an order to pay money, without more, cannot constitute a taking. Pet. App. 18a-20a (citing 524 U.S. at 540 (1998) (Kennedy, J., concurring); *id.* at 554 (Breyer, J., dissenting)). The *en banc* court next adopted the view of a prior panel that the EPACT assessments constituted a "sovereign act" and thus could not be the subject of a breach of contract claim against the government. Pet. App. 21a-22a.

Finally, the *en banc* majority rejected Petitioner's claim under the Due Process Clause. Conceding that the special assessments were "severely retroactive and costly" (Pet. App. 31a), the majority held that they were properly sustained under a two-part test the court announced to govern such claims: (1) "the party subjected to the retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party"; and (2) "the imposition of retroactive liability would not be contrary to that party's reasonable expectations." *Id.*

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[6] The Federal Circuit specifically held that its jurisdiction is exclusive because the Court of Federal Claims can provide an "adequate remedy" not only for requests for monetary relief for violations of the Takings Clause pursuant to the Tucker Act, but also for due process claims (which it characterized as alleging an "illegal exaction") and requests for prospective injunctive and declaratory relief. Adopting the reasoning of a prior panel decision (*Consolidated Edison Co.* v. *United States*, 247 F.3d 1378, 1384 (CAFC), *cert. denied*, 122 S. Ct. 644 (2001)), the *en banc* Federal Circuit concluded as a matter of law that all such suits must be heard in the Court of Federal Claims rather than federal district court, because "a claimant with an alternative adequate remedy in another court, such as the Court of Federal Claims, cannot seek review of agency action in a district court under the [Administrative Procedure Act]." *Consolidated Edison*, 247 F.3d at 1383 (discussing 5 U.S.C. 704 (providing that waiver of sovereign immunity applies only when no "adequate remedy" is available elsewhere, including in the Court of Federal Claims)).

Under this test, the Federal Circuit gave no weight to several considerations cited by Petitioner that called EPACT's constitutionality into question, such as the amount of the assessment, the extremely long period of retroactivity, and the government's self-interest in imposing the assessment, acknowledging that its *per se*, two-part test conflicted with decisions of the Fifth and Eighth Circuits, which apply an *ad hoc*, multi-factor approach. Pet. App. 20a. The Federal Circuit also explicitly held that, as a matter of law, Petitioner's fixed-price contracts could not support *any* expectation that the government would not retroactively impose additional costs based upon the same transactions. *Id.* 48a.

The Federal Circuit then concluded that EPACT satisfied its two-part test. *First*, Petitioner "benefited" from its purchase of government-enriched uranium, while the enrichment process "contributed to a societal problem" in the form of contamination of the government's enrichment plants. Pet. App. 31a-32a. *Second*, EPACT's retroactivity did not "violate[] the utilities' reasonable expectations." *Id.* 34a. The majority reasoned that the utilities should have "expected" that their purchases of enrichment services would subsequently expose them to assessments of hundreds of millions of dollars to fund the clean-up of the government's enrichment facilities because: (1) production of energy from nuclear sources is a highly regulated field; (2) the utilities knew that the government's production of enriched uranium would eventually require that the plants be decontaminated (even if the utilities didn't know *they* would have to pay for it), and (3) Commonwealth Edison could have "easily foreseen" that Congress might create a wholly new law retroactively imposing additional charges related to the purchase of enrichment services, which was "telegraphed" by statutes such as CERCLA and a long tradition of governmental regulation of the environment. *Id.* 36a-37a, 51a.[7]

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[7] A panel of the Federal Circuit contemporaneously issued an opinion, decided under the constraints of the *en banc* decision, dismissing similar claims brought by three other utilities. Pet. App. 53a-68a. But for the *en banc* decision, the panel would have held that the assessments violated due process. Three dissenting members of the *en banc* court adopted the panel

This Petition followed.[8]

## REASONS FOR GRANTING THE WRIT

Certiorari is warranted for two reasons. *First*, the importance of the decision below is manifest. Not only is the severe retroactivity of the EPACT assessment unparalleled in the Nation's history, but the Federal Circuit's exceedingly broad conception of its own exclusive jurisdiction guarantees that its lenient test will govern subsequent challenges to numerous other retroactive exactions. This case is also an important successor to *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), for it presents this Court with the opportunity to both (i) clarify which classes of financial exactions are immune from a takings claim, and (ii) give effect to the judgment in that case, which the lower courts have limited narrowly to its precise facts.

*Second*, the Federal Circuit's legal standard for evaluating the constitutionality of retroactive exactions conflicts with this Court's precedents and with decisions of other circuits. Other courts have been faithful to this Court's direction that retroactive assessments should be evaluated on the basis of "*ad hoc*, factual inquiries into the circumstances of each particular case." *Connolly* v. *PBGC*, 475 U.S. 211, 224 (1986). The Federal Circuit, by contrast, adopted a *per se*, two-part test, which assigns no weight whatsoever to a number of critical considerations. For example, the Federal Circuit eschewed *any* consideration of the period of retroactivity, the amount of the exaction, and the assessed party's responsibility. In addition,

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opinion. See Pet. App. 52a (Mayer, C.J., joined by Newman and Rader, JJ.); *id.* 53a-68a (Friedman, S.J., joined by Mayer, C.J.). The dissenters emphasized that the *government* alone bore responsibility for causing the contamination. Pet. App. 65a. Furthermore, "when the [u]tilities entered into the [enrichment] purchase contracts at a fixed price, they had no reason to believe, or even suspect, that years later the government would seek to make them pay for a substantial portion of its cleanup costs." *Id.* 63a.

[8] Parallel petitions have been filed by three utilities seeking review of the panel decision in *Maine Yankee*, *supra*. See No. 01-1020, *Sacramento Muni. Util. Dist.* v. *United States*; No. 01-1155, *Maine Yankee Atomic Power Co.* v. *United States*; and No. 01-___, *Omaha Public Power Dist.* v. *United States* (filed contemporaneously with this Petition).

because Congress enacted the EPACT assessment to further the government's self-interest in profiting from the sale of USEC in contravention of the utilities' understanding of the liabilities they were assuming under the enrichment contracts, this case presents a fitting opportunity to answer the question left open by *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 471 (1985): "whether an allegation of a governmental breach of its own contract warrants application of [a] more rigorous standard" under the Due Process Clause.[9]

**I. The Extraordinary Importance Of The Federal Circuit's *En Banc* Ruling And Of The Question Presented Merits This Court's Review.**

1. By any measure, the *en banc* Federal Circuit has issued a constitutional ruling of exceptional importance. EPACT is not merely "severely retroactive" (Pet. App. 31a), but in fact is unrivaled in the history of the Republic. No court has ever sustained such a scheme. The 1992 EPACT statute facially reaches transactions dating back to 1945 and imposes assessments totaling some $2.25 billion. Petitioner's liability alone reaches approximately $140 million to date and will exceed $235 million in total, more than any other utility. Suits brought by over thirty utilities now pending in the Court of Federal Claims and Federal Circuit turn on the outcome of this and the related petitions for certiorari.

But more is at stake here than just EPACT. In the course of its decision, the *en banc* Federal Circuit adopted an exceedingly broad conception of its own exclusive jurisdiction, holding that the constitutionality of other retroactive federal exactions must similarly be decided in the Court of Federal Claims, under the test adopted in this case, at least whenever the plaintiff is subject

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[9] Question 3 presented by this Petition seeks review of the Federal Circuit's articulation and application of the "sovereign acts" and "unmistakability" doctrines. The grounds for granting certiorari on that question are set forth in a contemporaneously filed petition for a writ of certiorari, No. 01-___, *Omaha Public Power Dist.* v. *United States*.

to "a known and fixed series of payments over time." See Pet. App. 2a (adopting the analysis of *Consolidated Edison Co.*, 247 F.3d at 1384); *supra* at 5 n.5. That jurisdictional ruling guarantees not only that it will be impossible for a circuit conflict to develop over the constitutionality of the EPACT assessment, but also that the exceedingly lenient, *per se* test adopted by the *en banc* court in this case (see Part II, *infra*) will govern both takings and due process challenges to numerous other statutory schemes.

The decision below has particular significance because the Court of Federal Claims is also the exclusive forum for breach of contract claims against the government (see 28 U.S.C. 1491(a)(1)), and its decision cannot but seriously undermine the private sector's faith in the government "as a reliable contracting partner in the myriad workaday transactions of its agencies." *United States* v. *Winstar Corp.*, 518 U.S. 839, 883 (1996) (plurality opinion). The *en banc* Federal Circuit effectively held that there can be no constitutional impediment to Congress' retroactive imposition of additional costs on its contracting partners. The court deemed the first element of its two-part test for sustaining retroactive exactions – that the assessment not be "severely disproportionate" to the "benefit" received – to be satisfied as a matter of law in the context of *every* government contract. Thus, the Federal Circuit "easily disposed of" the benefit issue because Petitioner "benefited from the government's provision of enrichment services" simply by receiving the enriched uranium it purchased. Pet. App. 31a.[10]

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[10] The Federal Circuit's analysis is equally applicable to the common circumstance in which the government is the purchaser rather than the vendor under a contract, for the private party in that circumstance equally receives the "benefit" of the government's business. But in any event, the decision below has considerable significance in light of the many diverse products and services supplied by the government. See, *e.g.*, *United States* v. *Texarkana Trawlers*, 846 F.2d 297 (CA5 1988) (loans to fishing industry); *Wood* v. *United States*, 961 F.2d 195 (CAFC 1992) (forfeiture auctions); *Radiation Sterilizers, Inc.* v. *United States*, 867 F. Supp. 1465 (E.D. Wash. 1994) (cesium leasing); *Kiowa Indian Tribe* v. *City of Lawton*, 646 F. Supp. 1051 (W.D. Okla. 1986) (water services to Indian tribes); *Complaint of Walker's Midstream Fuel and Service Co.*, 636 F. Supp. 339 (W.D. Ky. 1986)

Regarding the second element of its test – the assessed party's "reasonable expectations" – the Federal Circuit held that government contractors, whatever the facts, cannot have *any* constitutionally protected "expectation" that the government will not retroactively rewrite the terms of the bargains it has made, because the government has sovereign authority to do virtually whatever it pleases. "The question * * * is not what [a government contractor] could expect the United States as a contracting party to do but what it could reasonably expect the United States as sovereign to do." *Id.* 35a. Thus, "a fixed price in a government contract *cannot create expectations* that the government will not use its sovereign power to impose additional costs." Pet. App. 48a (emphasis added).[11]

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(navigational aids); *Capital Development Co.* v. *United States*, 49 Fed. Cl. 178 (Fed. Cl. 2001) (timber sales); *Moncrief* v. *United States*, 43 Fed. Cl. 276 (Fed. Cl. 1999) (oil and gas lessees on federal lands); *Hughes Communications Galaxy, Inc.* v. *United States*, 34 Fed. Cl. 623 (Fed. Cl. 1995) (satellite launch services); *Mangual* v. *United States*, 27 Fed. Cl. 480 (Fed. Cl. 1993) (scholarships); Joshua I. Schwartz, *The Status of the Sovereign Acts and Unmistakability Doctrines in the Wake of* Winstar*: An Interim Report*, 51 ALA. L. REV. 1177, 1222 (2000) (nuclear waste processing, mortgages, and low-income housing).

[11] The Federal Circuit also reached the insupportable conclusion that a contract creates no constitutionally significant expectation even when, as in this case, it is entered into by sophisticated parties that are fully informed about the relevant risks. The court of appeals found its expectations analysis perversely *enhanced* by the fact that "all parties were aware of the hazardous nature of the materials." *Id.* 37a. Relying entirely on inapposite cases in which only *one* party was aware of potential risks – *Usery v. Turner Elkhorn*, 428 U.S. 1, 28 (1976), in which mine operators knew of the possibility of black lung disease, and *General Motors Co.* v. *Romein*, 503 U.S. 181, 191-92 (1992), in which employers relied on an erroneous view of state law and thus "took their chances," the Federal Circuit held that, because utilities knew that uranium enrichment caused pollution, they should have *expected* that the government would later impose a retroactive exaction in breach of its solemn undertaking.

Similarly significant is the breadth of the Federal Circuit's holding, not limited to the nuclear industry, that environmental regulation defeats any expectation against retrospective legislation. The decision below therefore effectively grants *carte blanche* for the imposition of severe, retrospective assessments for environmental remediation because any remotely imaginable scheme is *a fortiori* constitutional in light of this case, which sustained a $2.25

The importance of the Federal Circuit's expectations analysis is only enhanced by the fact that it is a self-fulfilling prophecy. Because "the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is." *Lucas* v. *South Carolina*, 505 U.S. 1003, 1034 (1992) (Kennedy, J., concurring). It is hard to imagine a circumstance in which, after the *en banc* decision below and in light of the Federal Circuit's assertion of broad exclusive jurisdiction, a government contractor could assert that it had no "reasonable expectation" that it would be required to pay a previously unimaginable sum to redress what the government has concluded in its unreviewable discretion to be appropriate. Even accepting that "[s]ome circularity must be tolerated in these matters" (*id.*), this Court should not let such an extraordinary ruling pass unreviewed. "In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 265-66 (1994). "[C]ontractual or property rights," in particular, are "matters in which predictability and stability are of prime importance." *Id.* at 271.

2. This Petition also presents an important opportunity for this Court to resolve the persistent and intolerable disagreement about the scope and effect of its decision in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). In particular, this case will permit the Court to define the class of monetary exactions that, because of their relationship to specific property interests, are subject to challenge under the Takings Clause. The Federal Circuit rejected Petitioner's takings claim out of hand because five members of this Court in *Eastern Enterprises* "agreed that regulatory actions requiring the payment of money are not takings." Pet. App. 20a. But the court of appeals erred in characterizing EPACT as involving "the mere imposition of an obligation to pay money" (*id.* 21a). This is not a case in which

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billion liability, reaching back more than four decades, that was not based upon any responsibility for causing the problem, but simply served as the most convenient way to generate revenue.

the statute "neither targets a specific property interest nor depends upon any particular property for the operation of its statutory mechanisms" (*Eastern Enters.*, 524 U.S. at 543 (Kennedy, J., concurring)). To the contrary, the assessment is "measured by a property interest" (*id.* at 540) – *viz.*, the Separative Work Units of enriched uranium purchased by Petitioner. Indeed, D&D Fund liability *attaches* to the enriched uranium. Thus, a transfer of the enriched uranium passes the liability along with the material and correspondingly diminishes its value. See 10 C.F.R. 766.3. Nor is EPACT "indifferent" to the property that will be used to satisfy the assessments. *Id.* Rather, the statute contemplates that utilities will secure a stream of income by passing on the assessments in rates. See 42 U.S.C. 2297g-1(g). Put simply, EPACT is designed to "take" that discrete stream of income.[12]

Even assuming that a majority of this Court were not to agree that the EPACT assessment is susceptible on this basis to a takings claim, review is warranted to give effect to the judgment in *Eastern Enterprises* in light of the treatment that decision has received at the hands of the lower courts in the four years since that case was decided. Those courts, including the *en banc* Federal Circuit in this case, have generally accepted the federal government's argument that *Eastern Enterprises undermines*

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[12] The Federal Circuit properly rejected the government's argument (Gov't Br. at 25) that this provision negates the utilities' ability to challenge the assessments. First, no evidence exists that Petitioner was able to pass on such costs. See *McKesson Corp.* v. *Division of Alcoholic Beverages and Tobacco, Dep't of Bus. Reg.*, 496 U.S. 18, 46-47 (1990) ("We have repeatedly recognized that determining whether a particular cost has been passed on to customers or suppliers entails a highly sophisticated theoretical and factual inquiry.") Moreover, as this Court made clear, neither a party's right to challenge an unconstitutional assessment *nor its right to recover a refund of such assessment* is affected by its alleged "pass-on" of the assessment to its customers. *Id.* at 18. Allowing the Government to "collect * * * unlawful taxes by coercive means and not incur any obligation to pay them back" contravenes due process. *Id.* at 39; see also *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 487-88 (1968) (rejecting argument that "passing on" improper overcharges to customers eliminates plaintiff's damages).

challenges to retroactive exactions.[13] Employing a novel combinatorial jurisprudence that treats the whole as less than the sum of its separate parts, they reason that five Justices in *Eastern Enterprises* agreed that a mere order to pay money can never constitute an unlawful taking, and furthermore that substantive due process claims are subject to the most lenient form of rationality review because no combination of five Justices reached the question whether to embrace Justice Kennedy's more rigorous review of severely retroactive legislation under the Due Process Clause. The government's position has thus consistently been that "*Eastern Enterprises* is inapposite, limited to its facts, and, by virtue of its fragmented parts, only binding in its specific result – holding the Coal Act assessment unconstitutional as applied to Eastern Enterprises." Gov't Br. 30. Generally agreeing, the lower courts have afforded no weight *either* to the *Eastern Enterprises*' plurality's recognition of the parallel between takings analysis and due process analysis (524 U.S. at 537) *or* to Justice Kennedy's explicit statement that his views were "in *full accord* with many of the plurality's conclusions" (*id.* at 568 (emphasis added)).[14]

The Federal Circuit's embrace of the government's remarkably ironic reading of *Eastern Enterprises* illustrates perfectly why only a further decision by this Court can give effect to the judgment in that case. For the provision of the Coal Act invalidated as applied in *Eastern Enterprises* was, by almost

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[13] See, *e.g.*, *United States* v. *Dico, Inc.*, 266 F.3d 864, 880 (CA8 2001); *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 170 & n.3 (CA3 1999); *Association of Bituminous Contractors* v. *Apfel*, 156 F.3d 1246, 1253, 1254 n.5 (CADC 1998).

[14] Compare, *e.g.*, the Federal Circuit's contention that "[i]n these Due Process cases the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts. We are charged simply with determining whether the congressional action was rational" (Pet. App. 24a) with, *e.g.*, 524 U.S. at 548 (Kennedy, J., concurring) (courts must "give[] serious consideration to retroactivity-based due process challenges," "confirming the vitality of our legal tradition's disfavor of retroactive economic legislation"), and with *id.* at 549 ("As a consequence, due process protection for property must be understood to incorporate our settled tradition against retroactive laws of great severity.").

any measure, more defensible than EPACT: there is no *conceivable* argument that purchasers of enriched uranium acted in any way that should have led them to expect that they would later have to pay for environmental remediation; the Coal Act's effective period of retroactivity was similar to EPACT's; the Coal Act imposed a far smaller financial burden on individual companies; and the government was not acting in pursuit of its own fiscal self-interest in enacting the Coal Act. The Federal Circuit nonetheless plainly would, under its two-part test, sustain the retroactive application of the Coal Act even to the operator in *Eastern Enterprises*. That operator plainly received a "benefit" (Pet. App. 27a) from the employees for which it was responsible under the Coal Act, inasmuch it was undisputed that "[f]or many years Eastern benefited from the labor of those miners" (524 U.S. at 553 (Breyer, J., dissenting)). And, in the Federal Circuit's view, the coal companies would have had no "reasonable expectation" against retroactive liability, for the coal industry is (like the nuclear industry) "highly regulated" (Pet. App. 36a), and a wide range of laws – continuing the tradition of workers' compensation laws and the assessment sustained by this Court in *Turner Elkhorn* – just as strongly "telegraphed" (*id.* 43a) the possibility of retroactive liability.

Certiorari accordingly is warranted both to clarify the scope of the takings analysis of *Eastern Enterprises* and to give effect to this Court's judgment in that case.

## II. The *En Banc* Federal Circuit's *Per Se* Standard Conflicts With Decisions Of This Court And Other Circuits.

1. Time and again, this Court has held that challenges to the constitutionality of retroactive assessments must be evaluated with particular attention to their individual and often unique facts. The Court has declined to adopt categorical rules or to render whole classes of retrospective legislation either immune to all constitutional challenge or beyond Congress' power to enact in otherwise appropriate circumstances. Thus, in *Connolly* v. *PBGC*, 475 U.S. 211, 224 (1986), the Court unanimously reiterated that it had "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth

Amendment, and [had] relied instead on *ad hoc*, factual inquiries into the circumstances of each particular case." This Court has similarly evaluated claims that retroactive exactions violate the Due Process Clause by considering whether, on the particular facts, the legislation is "harsh and oppressive." *United States* v. *Hemme*, 476 U.S. 558, 567 (1986). For example, it has evaluated whether the retroactive application of a tax violated the Due Process Clause not according to a categorical rule but instead by "[f]ollow[ing] the approach in [its] prior cases," and "'consider[ing] the nature of the tax and the circumstances in which it [was] laid.'" 476 U.S. at 568.

Other circuits have remained faithful to this Court's decisions. Thus, the *en banc* Federal Circuit had to acknowledge that its *per se* two-part test engenders a circuit conflict: the court's opinion cites with a "but see" the Fifth Circuit's holding that takings challenges to a retroactive exactions are to be evaluated according to "*ad hoc*, fact-specific factors" and the Eighth Circuit's holding that a due process challenge to any such statute "would be 'essentially *ad hoc* and fact intensive.'" Pet. App. 20a (addressing *United States* v. *Hercules, Inc.*, 247 F.3d 706, 722 (CA8 2001), and *U.S. Fidelity & Guar. Co.* v. *McKeithen*, 226 F.3d 412, 416 (CA5 2000)). And the Fifth Circuit's *ad hoc* approach is not limited to takings cases, for it has similarly held that, "when retroactive legislation is challenged on due process grounds, a case-by-case analysis is required." *Ferman* v. *United States*, 993 F.2d 485, 490 (1993) (applying *Wiggins* v. *Commissioner*, 904 F.2d 311, 316 (CA5 1990)).

But the *en banc* Federal Circuit flatly rejected that approach, adopting instead a categorical rule under which "even severe retroactive obligations for past acts" are to be sustained whenever the rule's "two conditions are satisfied."[15] Moreover,

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[15] The court's statement that it was not "attempting to define *exactly* when retroactive legislation will be held unconstitutional" (Pet. App. 31a (emphasis added)) cannot be read to suggest that the Federal Circuit will subsequently examine such legislation more rigorously. To the contrary, the court immediately indicated that, in a later case, it might *eliminate* even the few restrictions on retrospective liability it applied here: "It may well be that

consistent with its "as-a-matter-of-law" approach, the Federal Circuit held that retroactive assessments were to be sustained without regard to any further evaluation of what the *actual* facts might be. For example, Petitioner's complaint (at ¶¶ 22, 23) alleges that the pollution redressed under EPACT arises from the government's use of the enrichment plants for military purposes and from the government's own choices in disposing of materials generated therefrom. Indeed, congressional testimony demonstrates that much of that pollution resulted from *intentional* government malfeasance in failing to act in an environmentally responsible manner. A.S.A. 137. The Federal Circuit recognized that, on the government's motion to dismiss, all allegations contained in the complaint must be treated as true and all inferences drawn in favor of the plaintiff. Pet. App. 17a. It nonetheless squarely held that Petitioner's allegations were irrelevant as a matter of law because the judiciary lacks any power to "determine[e] the actual state of facts" surrounding the necessity or impact of even the most extraordinary exaction. *Id.* 24a. That standard eliminates any opportunity to test whether an assessment is "arbitrary" because, for example, the government itself is principally responsible for causing the damage or has previously imposed the *identical* costs on its contracting partners.

2. Nothing in the Federal Circuit's two-part test – which considers only whether the assessment is "severely disproportionate" to the "benefit" received and violates "reasonable expectations" – substitutes for the fact-intensive inquiry mandated by this Court's precedents and applied by other circuits.

The first part of the Federal Circuit's test fails even to require a substantial nexus between the retroactive exaction and the party on which it is imposed. For example, the EPACT D&D Fund pays not merely for the clean up of the government's enrichment plants but also for a $490 *million* clean-up of thorium and uranium production facilities owned by private

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legislation is constitutional if *either* of the two conditions is satisfied, but we need not decide that question in this case." *Id.* (emphasis added).

companies. Not even the Federal Circuit, in its *post hoc* rationalization of grounds on which to sustain the EPACT assessment as rational, was able to articulate a ground for exacting money from utilities for that purpose, acknowledging, to the contrary, that "the utilities were not responsible" in any sense for that pollution. Pet. App. 33a n.19. Instead, the court of appeals, without further explanation, dismissed the enormous clean-up costs as a "*de minimis* diversion of funds." *Id.*

Nor does the Federal Circuit's reference to the "proportionality" of the assessment (Pet. App. 31a) further constrain the government's ability to impose severe retroactive exactions. In particular, as Petitioner's complaint alleges (J.A. 524-25), and as evidence before Congress demonstrated (A.S.A. 281-82), all or nearly all of the costs of remediating the government's enrichment plants arose from the use of those plants for military purposes, which constituted *ninety-six percent* of all enrichment until 1970. J.A. 524. The Federal Circuit nonetheless deemed the assessments "proportionate" – despite the fact that private enrichment neither contributed to pollution arising from military enrichment nor materially increased the costs of remediation.

The second part of the Federal Circuit's test – whether the retroactive assessment contravenes "reasonable expectations" – is unobjectionable in principle but, as conceived by the court of appeals, fails to provide any independent protection against unconscionable exactions. Rather, upon analysis, it actually provides less protection than a genuine rationality requirement might. For the Federal Circuit capped what it counted as legitimate expectations by the degree of prior governmental regulation. Because the nuclear industry is "highly regulated" (Pet. App. 36a) and because state and local governments had long ago adopted extensive environmental regulations (*id.* 36a-40a), the court of appeals held that electric utilities could have no "reasonable expectation" that the federal government would

not retroactively impose upon them the costs of remediating the government's enrichment facilities – *Q.E.D.*[16]

The transparent flaw in the Federal Circuit's test is that it effectively converts the extensive intrusion of modern government into all spheres of private activity into an open-ended license to seize private property for past acts. Unlike the decision below, this Court's precedents do not look to whether other regulations "telegraphed" (Pet. App. 43a) the possibility of retroactive legislation. Indeed, the Federal Circuit's analysis runs directly contrary to the thrust of this Court's recent expectations jurisprudence, which requires an inquiry not merely into whether prior legislation in the same general area could undermine property owners' expectations, but also into whether any legislatively inspired erosion of such expectations, including erosion by laws directly applicable to the subject matter at hand, is "objectively reasonable." Thus, in *Palazzolo* v. *Rhode Island*, the Court rejected a rule prohibiting subsequent purchasers of property that was already subject to various land-use regulations from raising takings challenges even to those very regulations, reasoning that such a standard would give the state the unfettered power to "shape and define property rights and reasonable investment-backed expectations." 121 S. Ct. 2448, 2462 (2001). The relevant inquiry, the Court held, is instead whether, in light of the facts and circumstances, the destruction of property interests is so "unreasonable or onerous" as to require just compensation. *Id.*; see also *Lucas*, *supra*, 505 U.S. at 1033 (Kennedy, J., concurring) (calling for inquiry into "objective reasonableness" of governmental action). That reasoning is no less applicable if the analytic rubric being employed is substantive due process rather than takings. The Federal Circuit, by contrast, looked to the entire surrounding array of environmental regulation (including regulation concededly inapplicable to the matters at issue) and did so

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[16] The court of appeals did not suggest that its test was limited to "highly regulated" businesses, but the decision below in any event has great significance even if it is construed in that fashion, as can be seen from the appendix (Pet. App. 175a-179a), which collects an illustrative list of the many sectors of industries that can be so classified.

without the slightest consideration of whether it would be reasonable to deem utilities' expectations defeated by extrapolation from the tangentially relevant regulations encompassed within that survey.

This Court's precedents, unlike the decision below, furthermore deem regulation to be relevant to the expectations analysis only when it would cause a reasonable person to conclude that the government was likely to impose the *specific form of liability* in question. *Eastern Enterprises* thus rejected the contention of the court of appeals and the dissent that "the pattern of federal intervention in the coal industry" vitiated the employer's expectations. 524 U.S. at 519. Citing *Connolly*, *supra*, 475 U.S. at 227, the *Eastern Enterprises* plurality recognized that prior governmental regulation undermines a sophisticated business's "expectations" only if it gives "sufficient notice" that a specific form of retroactive liability might be imposed – in that case, "that lifetime health benefits might be guaranteed to retirees several decades later." *Id.* at 536. Justice Kennedy has similarly cautioned that "*the means*, as well as the ends, of regulation must accord with the owner's reasonable expectations." *Lucas*, 505 U.S. at 1035 (concurring opinion) (emphasis added).

The regulations identified by the Federal Circuit do not meet this Court's far more rigorous standard for deeming regulation to defeat a reasonable expectation against retroactive liability. Although the private owners of nuclear power plants are of course "highly regulated" (Pet. App. 36a), the more salient point is that they are *not* heavily regulated with respect to the specific subject matter of the EPACT assessment. The relevant regulations and contracts imposed complete responsibility for the enrichment process upon the *government*. See *supra* at 2. The only reasonable expectation that could possibly have arisen from that regulatory scheme was that the responsibility for any environmental remediation stemming from the enrichment process would likewise be the government's.

In addition, although the court of appeals cited an array of environmental legislation, "virtually no environmental law other than CERCLA (and its state-law equivalents) allocates

potentially massive liabilities to activities performed entirely in the past and completed before the law took effect." Bruce Howard, *Reforming Retroactivity and Current Owner Liability Standards in CERCLA to Increase Fairness and Efficiency*, 9 J. NAT'L RESOURCES & ENVT'L L. 325, 326-27 (1994). At the very least, CERCLA could not affect Petitioner's expectations regarding the more than forty percent of its purchases that were made before that statute's effective date in 1980. Moreover, the irony in the Federal Circuit's attempt to justify EPACT based upon CERCLA principles is that, if Congress *had* decided to resolve remediation of the government's plant though CERCLA, the *government* would plainly be responsible for the clean-up costs because the government expressly assumed ownership of all materials used in the processing and maintained exclusive control over the operation of the plants and disposal of waste materials. J.A. 525. None of the cases relied upon by the Federal Circuit has extended CERCLA liability to a party in Petitioner's position. Cf. *Webb's Fabulous Pharmacies* v. *Beckwith*, 449 U.S. 155 (1980) (sustaining takings claims despite pre-existing state regulations that arguably put private party on notice that interest on interpleaded fund would be seized by state).[17]

Also, the Federal Circuit's expectations analysis jettisons a key CERCLA principle that allocates liability based upon the "relative fault of the parties" *potentially* responsible for contribution. *Kerr-McGee Chem. Corp.* v. *Lefton Iron & Metal*

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[17] Thus, in *United States* v. *Aceto Agricultural Chemical Corp.*, 872 F.2d 1373, 1382 (CA8 1989), the court found a party "potentially" responsible under CERCLA when it hired a contractor that was "performing a process on products owned by defendants for defendants' benefit and at their direction." Similarly, in *Hercules, Inc.*, 247 F.3d at 715, *potential* liability turned on either *ownership* of hazardous materials provided to another for processing or *control* over the formulation and disposal of materials. *Id.* (citing *United States* v. *Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (CA8 1986)). Here, by contrast, Commonwealth Edison had neither ownership nor control of the enriched uranium purchased from the government. The vast majority of CERCLA cases have firmly rejected extension of liability to mere purchasers of products. See, *e.g.*, *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333, 1336 (CA11 2000).

*Co.*, 14 F.3d 321, 326 (CA7 1994). Courts have not hesitated to assign one hundred percent of the responsibility to the party primarily responsible for the contamination. See *Foster* v. *United States*, 130 F. Supp. 2d 68, 78 (D.D.C. 2001) (one-hundred-percent liability imposed on District of Columbia when "facts proved at trial * * * [that] the District – and only the District – was integrally and actively involved in the disposal of the hazardous waste found on the Property * * *. There is no evidence to implicate any other source."); see also *PMC, Inc.* v. *Sherwin Williams Co.*, 151 F.3d 610 (CA7 1998) (allocation of one-hundred-percent liability to party responsible for *most* of waste disposal); *Kelley* v. *EPA*, 15 F.3d 1100 (CADC 1994). And, by immunizing USEC from liability, EPACT again violates the fundamental CERCLA principle that subsequent buyers of contaminated property (especially those with knowledge of the contamination) remain potentially responsible for funding remediation. 42 U.S.C. 9607(a)(1). If anything, therefore, CERCLA *reinforced* Petitioner's expectation that the government would bear responsibility for contamination created by the government's own enrichment activities.[18]

3. The legal error in the Federal Circuit's decision is not merely that it adopts a *per se* test for evaluating the constitutionality of even "severely retroactive" exactions, or that its two-part test is circular and fails to protect the interests underlying the Takings and Due Process Clauses. Just as important, the Federal Circuit's test assigns *zero* weight to a large number of factors that other circuits, and indeed this Court, have deemed highly relevant to their examination of retroactive exactions. The Federal Circuit's test renders legally immaterial at least *seven* important considerations, each of which calls EPACT into fundamental question.

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[18] Courts have also noted the constitutional difficulty posed by retroactive CERCLA application even when the defendant has caused at least some of the harms at issue. *E.g.*, *Asarco, Inc.* v. *Department of Ecology (State of Washington)*, No. 98-2-01729-2 (Wash. Super. Ct., Thurston Cty., Dec. 16, 1999); *United States* v. *Asarco, Inc.*, No. CV 96-0122-N-EJL, 1999 U.S. Dist. LEXIS 18924, at **26-27 (D. Idaho Sept. 30, 1999).

*First*, the Federal Circuit's decision leaves no room for courts to consider the degree of the assessment's retroactivity – *i.e.*, how far back in time it reaches. That cannot possibly be right, for the passage of time not only creates "settled" expectations, but also makes a retroactive assessment progressively more "arbitrary." It thus makes a great deal of difference whether legislation assigns new burdens to an act undertaken three months ago (as often occurs in the tax context) or instead three *decades* ago (as in this case). The government's power to impose retroactive burdens "must at some point give way to the [assessed party's] interest in finality and repose." *Carlton*, 512 U.S. at 37-38 (O'Connor, J., concurring).

Five members of the Court expressly adopted that view in *Eastern Enterprises*. The *very first* fact that the plurality deemed relevant to its analysis of the plaintiffs' expectations was that the Coal Act's "beneficiary allocation scheme reaches back 30 to 50 years," "long after the company believed its liabilities * * * to be settled." 524 U.S. at 532-33. Justice Kennedy, concurring, similarly emphasized that "[i]f retroactive laws change the legal consequences of transactions long closed, the change can destroy the reasonable certainty and security which are the very objects of property ownership." *Id.* at 548. The Court made essentially that point in *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, explaining that, although the Court had "held that the retroactive assessment of a tax increase does not necessarily deny due process," "beyond some *temporal point* the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation,' depending on 'the nature of the tax and the circumstances in which it is laid.'" 496 U.S. 18, 41 n.23 (1990) (emphasis added).[19]

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[19] Although this Court has afforded considerable deference to Congress' determination of how best to reorder economic rights and obligations, even retrospectively, it has generally done so in cases in which the period of retroactivity is relatively short. This Court's due process jurisprudence thus accommodates the "'customary congressional practice'" of adjusting revenue legislation "'confined to short and limited periods required by the practicalities of producing national legislation.'" *Carlton*, 512 U.S. at

Courts of appeals other than the Federal Circuit have similarly accorded great weight to the period of retroactivity. The Third Circuit, for example, has adhered to its view that the first element of any inquiry into whether a retroactive exaction violates the Due Process Clause is "the length of time of the retroactivity," and has concluded that a retroactive period of eleven years "approaches the edge of permissible legislative action." *Anker Energy Corp.* v. *Consolidation Coal Co.*, 177 F.3d 161, 173 (1999); *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 652 (1999); *Tate & Lyle, Inc.* v. *Commissioner*, 87 F.3d 99, 107 (CA3 1996). The Ninth Circuit has applied this Court's decisions, which have "placed considerable weight on the brevity of the period of retroactivity," and has joined the Second Circuit in holding that it should be "'a significant factor * * * in the overall assessment of the constitutionality of the legislation.'" *Licari* v. *Commissioner*, 946 F.2d 690, 694-96 (1991) (quoting *Canisius College* v. *United States*, 799 F.2d 18, 26-27 (CA2 1986)). And the Fifth Circuit has similarly called for a "case-by-case analysis" in which the period of retroactivity is "one factor to be considered." *Wiggins* v. *Commissioner*, 904 F.2d 311, 316 (1990).

*Second*, the Federal Circuit's test, which explicitly encompasses even the most "severe" assessments, deems immaterial the magnitude of the burden imposed – generally, how much money must be paid. Once again, that cannot be right. As a matter of common sense, it makes a great deal of difference if the assessment is a few thousand dollars (as in most of this Court's cases dealing with retroactive tax legislation) or is instead $235 *million* (the amount Petitioner must pay under EPACT). Thus, in the context of retroactive tax burdens, the Court has ruled that, "[w]hile the amount of tax is not dispositive, it is one circumstance of the transaction to be

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32 (quoting *Darusmont*, 449 U.S. at 296)). See also *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717, 731 (1984) (same). Justice O'Connor has thus recognized that "[i]n every case in which [this Court has] upheld a retroactive tax statute against due process challenge * * * the law applied retroactively for only a relatively short period of time prior to enactment." *Carlton*, 512 U.S. at 38 (concurring opinion).

considered." *United States* v. *Hemme*, 476 U.S. 558, 571 (1986). And the Third Circuit has thus described "the aggregate burden" of an exaction as "significant under our due process jurisprudence." *Unity Real Estate Co.* v. *Hudson*, 178 F.3d 649, 672 (1999).

*Third*, the Federal Circuit's test assigns no weight to the relative responsibility of the government and the assessed party for the problem that Congress seeks to redress through the extreme remedy of retroactive legislation. For all nine Justices in *Eastern Enterprises*, the single most important fact in determining whether the assessment was constitutional was whether the coal operators in that case were responsible for the employees' expectation of lifetime health benefits. Compare 524 U.S. at 530-31 (plurality opinion) and *id.* at 549 (Kennedy, J., concurring) with *id.* at 559-60 (Breyer, J., dissenting) (arguing that the assessment was valid principally because operators had made an implicit promise to pay). In this case, there is no suggestion that the utilities created any expectation that *they* would pay for environmental remediation. Moreover, the government *admitted* that the "assessments are *not* premised upon any responsibility [by the utilities] for contamination" at the government's enrichment facilities (Gov't C.A. Br. 31 (emphasis added)), and it is furthermore undisputed that utilities "had no control over the activities" (*Eastern Enters.*, 524 U.S. at 532) at those plants. The Federal Circuit's test, however, makes those facts totally irrelevant.

*Fourth*, the Federal Circuit's test assigns no weight to the circumstances said to require Congress' departure from the normal processes of prospective legislation. Thus, this Court has sustained retroactive exactions, in limited circumstances, "to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Landgraf*, 511 U.S. at 268. The *en banc* Federal Circuit, by contrast, categorically held that burdensome retroactive assessments are appropriate whenever Congress perceives any "societal problem." Pet. App. 31a. That formulation, of course, imposes no limitation at all:

"Every law touching on an area in which Congress has previously legislated can be said to serve the legitimate purpose of fixing a perceived problem with the prior state of affairs – there is no reason to pass a new law, after all, if the legislators are satisfied with the old one." *Carlton*, 512 U.S. at 36 (O'Connor, J., concurring).

*Fifth*, the Federal Circuit's test deems it irrelevant whether an assessment is *wholly retroactive* and thus lacks any prospective component. This is an important consideration because retroactive legislation can unjustly target not just "unpopular groups or individuals" (*Landgraf*, 511 U.S. at 267) but entities of means that are nonetheless powerless to avoid the burden imposed because the events giving rise to liability – here, the enrichment contracts – all lie in the past. In addition, pure retrospectivity carries the risk that Congress will "induc[e] [private parties] to engage[] in [the assessed] transactions," then retroactively change the understood terms of the bargain. *Carlton*, 512 U.S. at 32. The decisions of this Court on which the Federal Circuit relied thus generally involved the "'retroactive *application*'" (Pet. App. 33a (quoting *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984)) (emphasis added)) of statutes that applied equally on a prospective basis.

EPACT, of course, is purely retroactive. Moreover, the Federal Circuit acknowledged that the government induced utilities such as Petitioner to purchase enrichment services from the United States, rather than from foreign suppliers, by lowering the costs under its fixed-price contracts and promising that those costs would not exceed a fixed ceiling. Pet. App. 7a. Just as "the tax consequences of commercial transactions are relevant, and sometimes dispositive" (*Carlton*, 512 U.S. at 38 (O'Connor, J., concurring)), out-of-pocket costs were manifestly a vital consideration in the utilities' decision to contract with the federal government. Yet decades after the contracts were fully performed, the government imposed billions of dollars of new costs based upon the same purchases on its former customers

who (apart from the protections of the Takings and Due Process Clauses) are powerless to do anything about it.[20]

*Sixth*, the Federal Circuit's test specifically assigns no weight to whether the federal government acted out of its own self-interest. In *United States* v. *James Daniel Good Real Property*, this Court held that the Due Process Clause guarantees a private party the right to notice and an opportunity to be heard before the government forfeits his real property. The Court deemed the availability of a neutral decisionmaker particularly critical because "the Government has a direct pecuniary interest in the outcome of the proceeding," adopting Justice Scalia's view that "'[i]t makes sense to scrutinize governmental action more closely when the State stands to benefit.'" 510 U.S. 43, 56 (1993) (quoting *Harmelin* v. *Michigan*, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)). A plurality of the Court made an analogous point in *Winstar*, relying on cases decided under the Contracts Clause that "have demonstrated a similar concern with governmental self-interest by recognizing that 'complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.'" 518 U.S. at 897 n.41 (quoting *U.S. Trust Co.*, *supra*, 431 U.S. at 26, and citing *Energy Reserves Group* v. *Kansas Power & Light Co.*, 459 U.S. 400, 412-13 & n.14 (1983)). And in *Eastern Enterprises*, Justice Kennedy noted the heightened scrutiny applicable to "the Government's self-enrichment." 524 U.S. at 544.[21]

The Ninth and Tenth Circuits have similarly extended the Contracts Clause analysis of *U.S. Trust* to the substantive due process context. See *Sheridan Square P'ship* v. *United States*,

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[20] The abuses that can arise from purely retroactive assessments are apparent from Congress' decision to "diver[t]" (Pet. App. 33a n.19) $490 million of the EPACT D&D Fund to pay to clean up private thorium and uranium facilities. See *supra* at 4.

[21] The government's self-interest is particularly apparent when the assessed party has already paid for the service in question. Here, as in *Webb's Fabulous Pharmacies*, *supra*, 449 U.S. 155, the government may not charge a private party for a service then, by *ipse dixit*, exact still more money as a supposed further payment for the same service.

66 F.3d 1105, 1108 (CA10 1995) ("Notwithstanding our usual deference to congressional enactments, we review economic legislation with particular scrutiny when a government attempts to redefine or abrogate its own contractual relationships."); *Northwestern National Life Ins. Co.* v. *Tahoe Regional Planning Agency*, 632 F.2d 104, 105-06 & n.1 (CA9 1980) (applying *U.S. Trust* to Contracts Clause claim and holding that analysis under Due Process Clause is "essentially the same").

The Federal Circuit, by contrast, held that its exceedingly deferential standard of review is no less applicable to cases in which the government imposes a severe retroactive exaction solely out of fiscal self-interest than to cases in which it does so largely or wholly as a disinterested referee of competing economic claims. The overriding purpose of the government's retention of liability for clean-up of its enrichment plants was unquestionably to maximize the federal government's profits from the sale of USEC. See generally H.R. Rep. No. 102-474, Part 2, *reprinted in* 1992 U.S.C.C.A.N. 2064. The plain purpose of the D&D Fund assessments was to shift a substantial portion of the cost of that decision to the government's former contracting partners. Yet, under the Federal Circuit's test, that purpose drops out of the picture entirely.

Because Congress imposed the EPACT assessment notwithstanding the fact that Petitioner's obligations to pay for enrichment services were specifically set by fixed-price contracts, this case also provides the Court with the opportunity to answer the question it left open in *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 471 (1985): "whether an allegation of a governmental breach of its own contract warrants application of [a] more rigorous standard" under the Due Process Clause. *Atchison* suggested that "the Government's impairment of its own obligations perhaps should be treated differently," invoking the heightened standard applicable under the Constitution's Contract Clause to legislation enacted in "the 'State's self-interest.'" 470 U.S. at 472 n.24 (quoting *U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1, 26 (1977)).

*Seventh*, the Federal Circuit's *per se* test fails to consider whether the challenged statute provides procedural protections against the imposition of unjust assessments or instead vests the executive with untrammeled discretion. "'It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.'" *Landgraf*, 511 U.S. at 267 n.20 (quoting *Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 513-14 (1989) (Stevens, J., concurring in part and concurring in the judgment)). Thus, the decision principally invoked by the government and the Federal Circuit, *Turner Elkhorn*, sustained the retroactive imposition of health-care costs only on a generic basis, and only in the context of emphasizing the numerous avenues available to coal companies to challenge the imposition of liability for *each* worker. The availability of such individualized determinations by a neutral decisionmaker is also an important characteristic of other statutory schemes cited by the Federal Circuit, including CERCLA.

EPACT, by contrast, imposes on Petitioner an obligation to pay hundreds of millions of dollars to the federal treasury, but provides no meaningful opportunity to challenge the assessments or the expenditure of the funds exacted from them. The Federal Circuit's decision in this case also deprives the utilities of any remotely searching review of the basis for the assessments as a generic matter, including with respect to whether the "actual state of facts" necessitated the adoption of the scheme of assessments or instead rendered it arbitrary. See *supra* at 17.[22]

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[22] EPACT's failure to provide any judicial check is particularly significant in the context of the government's *self-interested* exactions. This Court has recognized the significant constitutional concerns raised when a prosecutor or adjudicator has a "personal, substantial, pecuniary interest" in the outcome. See *Concrete Pipe & Prods. Of Cal., Inc.* v. *Construction Laborers Pension Trust Fund for S. Cal.*, 508 U.S. 602, 617 (1993); *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 248-49 (1980); *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927).

Because the Federal Circuit's novel *per se* standard conflicts with the fact-intensive test mandated by this Court's precedents and applied by other circuits and specifically gives no weight to numerous factors, both generic and individual, that precedent establishes are critical to the constitutional inquiry, and because of the unique jurisdictional shield with which the Federal Circuit has insulated its unprecedented standard from intercircuit challenge and has thereby effectively given it a continuing nationwide reach – in applications to takings, substantive due process, and government contracts decisions – plenary review by this Court is imperative.

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 20, 2002

# APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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No. 00-5069

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COMMONWEALTH EDISON COMPANY,
*Plaintiff-Appellant,*

v.

UNITED STATES,
*Defendant-Appellee.*

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Nov. 20, 2001

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Before MAYER, *Chief Judge*, NEWMAN, MICHEL, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, GAJARSA, LINN, and DYK, *Circuit Judges*.*

DYK, *Circuit Judge*.

This case is one of a large number of cases brought in the Court of Federal Claims challenging the constitutionality of the Energy Policy Act of 1992, Pub.L. No. 102-486, 106 Stat. 2776 (codified as amended in various sections of 42 U.S.C.) ("EPACT" or "the Act"), which imposes special monetary assessments on domestic utilities for the remediation of environmentally contaminated uranium processing facilities owned by the United States. *See* 42 U.S.C. § 2297g 1. After argument before a panel on April 4, 2001, we *sua sponte* ordered that the case be heard in banc without additional briefing. The case was heard in banc on October 3, 2001.

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* Circuit Judge Prost, who entered on duty on October 3, 2001, has not participated in the disposition of this case.

In light of our decision in *Consolidated Edison Co. v. United States*, 247 F.3d 1378 (Fed.Cir.2001),[1] Edison's request for a stay of the proceedings in the Court of Federal Claims has become moot.

On the merits, we conclude that requiring plaintiff Commonwealth Edison Company ("Edison") and the other domestic utilities that benefited from the uranium processing services to contribute to the remediation costs does not constitute a Fifth Amendment taking because the Takings Clause does not apply to legislation requiring the payment of money. We also conclude that the Act does not violate the Due Process Clause of the Fifth Amendment. The retroactive application of the Act rationally furthers a legitimate legislative objective—the remediation of contaminated facilities used by the United States to process uranium for domestic utilities. Congress reasonably concluded that the utilities received benefits from the processing and that the utility processing contributed to the contamination. Liability was imposed on those utilities for only a portion of the cleanup costs. As a matter of law, Edison and other similarly situated utilities could have reasonably expected to be liable for a share of the remediation costs arising from the contamination of the processing facilities. Edison's other arguments on the merits are foreclosed by our decision in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed.Cir.1997), *cert. denied*, 524 U.S. 951, 118 S.Ct. 2365, 141 L.Ed.2d 735 (1998).

We therefore dismiss as moot the appeal from the denial of the stay request and affirm the decision of the Court of Federal Claims dismissing the complaint.

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[1] This opinion replaced our previous decision in that case, reported at 234 F.3d 642 (Fed.Cir.2000).

## BACKGROUND

This case arises against the background of our earlier decision in *Yankee Atomic* where we rejected contentions that EPACT breached uranium processing contracts between Yankee Atomic Electric Co. ("Yankee Atomic") and the United States and constituted a taking of those contract rights. Some of the claims asserted by Edison are the same as those asserted in *Yankee Atomic*. Edison also claims that the statutory obligation to pay money to the government constitutes a taking of that money, and that the retroactivity of the Act renders it unconstitutional under the Due Process Clause.

Resolution of this appeal requires a brief overview of the history of the United States government's involvement in the enrichment of low-grade uranium for Edison and other domestic utilities, as well as the provisions of EPACT.

The uranium processing facilities involved here were originally constructed and operated by the United States government for national defense purposes. Between 1945 and 1970, approximately 96% of the enriched uranium produced by the government was used for weapons production. These facilities were also capable of producing enriched uranium for nuclear power reactors.

Before 1954, United States law permitted only the United States government to own nuclear power reactors. In 1954, however, Congress enacted amendments to the Atomic Energy Act of 1954, Pub.L. No. 83-703, 68 Stat. 919, which for the first time authorized private ownership of nuclear power reactors. The government extensively regulated these reactors, *inter alia*, "to protect the health and safety of the public" from the possible environmental hazards. *Id.* at § 2 (codified as amended at 42 U.S.C. § 2210).

Plaintiff Edison is a domestic utility company with its principal place of business in Illinois. Beginning in 1960, Edison owned and operated nuclear reactors, which it used to

generate electrical power for sale and distribution to its customers in Illinois. Those nuclear reactors, in turn, required enriched uranium.

Edison alleges that in 1960 it began to "purchase or lease" enrichment services from the government. However, we note that until 1964 the government retained strict control over the technology used to enrich low-grade uranium for use in nuclear reactors, and barred private ownership of enriched uranium. In that year, Congress passed the Private Ownership of Special Nuclear Materials Act, Pub.L. No. 88-489, 78 Stat. 602 (1964), which authorized the private ownership of enriched uranium. After the passage of that act, the government began to offer uranium enrichment services to commercial customers like Edison.

Beginning in 1969, Edison entered into a series of multi-year contracts with the United States government in which Edison agreed to purchase uranium enrichment services from the United States. Those enrichment services were provided at enrichment plants operated first by the Atomic Energy Commission and later (beginning in 1974) by the Energy Research and Development Administration and, ultimately (beginning in 1977) by the Department of Energy (collectively, "DOE").

Under those contracts, Edison delivered low-grade uranium to the government-owned facilities for enrichment. The government took title to the low-grade uranium, processed the uranium, and returned enriched uranium to Edision. The enrichment services were measured in terms of "separative work units" ("SWUs"). The plaintiff here, like other domestic utilities, paid for the services by multiplying the number of SWUs provided by the unit price set forth in its contracts with the government. Although the utilities' contracts varied somewhat, each stated that the price paid by the utility for the enrichment services would be based on an "established Commission pricing policy," defined under the

contracts as the price in effect at the time the service was rendered. A number of these contracts also capped the maximum per unit charge for the enrichment services. Edison alleges in its complaint that it purchased a portion of its uranium enrichment services "with the Government's knowledge and consent, from other sources." First Amended Complaint of Plaintiff-Appellant Commonwealth Edison Company (hereinafter "Complaint") at ¶ 50.

Edison alleges that "[b]y the late 1970s and early 1980s, foreign suppliers of uranium enrichment services emerged, threatening the Government's monopoly power and creating significant competition for the Government." *Id.* at ¶ 41. Edison further alleges that the Government's share of the uranium processing market "declined substantially, from nearly 100% in the 1960s and 1970s, to below 50% in 1983." *Id.* Edison elected, however, to continue to use government processing facilities even though those foreign alternatives became available.

In January 1984, the government developed a standard requirements-type contract for uranium enrichment services, referred to as a Utility Services Contract. In July 1984, Edison entered into a Utility Services Contract after terminating all of its existing uranium enrichment services contracts with the government through a Supplemental Agreement of Settlement ("Settlement Agreement"). This Utility Services Contract, like the previous contracts, charged the utilities for the services according to the "established pricing policy," and likewise capped the maximum unit charge. It appears that the government developed this Utility Services Contract, at least in part, at the request of Edison and the other domestic utilities.

As a result of the government's use of the processing facilities for national defense purposes, they had become contaminated, even before the utilities' uranium processing commenced. Although Edison alleges that the facilities were

"fully contaminated with radioactive and other hazardous materials" before they began to be used for the processing of the utilities' uranium, Complaint at ¶ 23, there is no question that the processing of the utilities' uranium caused the same type of contamination as the government's earlier use of the facilities to enrich uranium for weapons purposes. Indeed, Edison at oral argument specifically conceded that that was the case, and agreed that contamination cleanup costs are incurred any time uranium is enriched, including when it is enriched for the benefit of the utilities. Edison alleged, however, that the cleanup costs were not "materially" increased by the later contamination resulting from the utility uranium processing.[2]

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[2] At oral argument, counsel for Edison explained Edison's contribution to the contamination as follows:

> COUNSEL FOR EDISON: If it can be demonstrated—in our cases there's nothing in the record—but if it can be demonstrated that there was additional cost associated with the enrichment being—services provided to the commercial utilities, then perhaps there would be an argument that we have a certain responsibility. . . .
> THE COURT: Well, of course there are. You can't run a nuclear enrichment program without creating contamination, so of course-we can quarrel about exactly how to measure them or how big they are, but of course there are contamination cleanup costs.
>
> COUNSEL FOR EDISON: There are. Let me try to make an analogy. . . . I know in terms of nuclear utilities, when they have boiling water, nuclear generated, and they periodically are required to decontaminate, what they do is they have these very large deep swimming pool type reactors. What they do is paint the well of the reactor with a rubberized paint that the contamination adheres to. Then they peel that paint off and the—. . . The contamination adheres to that paint. So regardless of whether there is a half inch of contamination or a full inch of contamination, all the contamination adheres to that rubberized paint and you just peel it off, and the cost is no more.
>
> THE COURT: Well, that's basically your point, that the processing of the utilities' uranium caused pollution, but it didn't cost any more

Edison also admits in its complaint that the obligation to decontaminate and decommission the facilities "was an obligation well understood by operators of nuclear facilities throughout the industry." Complaint at ¶ 31. Although the contracts provided for recovery of the government's costs of operating the plants and fixed the price as of the time of delivery, the original contracts, the Utility Services Contract, and the Settlement Agreement did not expressly preclude (or even address) the government's future assignment to Edison of any remediation costs for the decontamination of the government's uranium enrichment facilities.[3]

These remediation costs were addressed by Congress in 1992. Faced with its declining share of the uranium processing market, Congress decided to restructure the government's uranium processing services in order to remain competitive with its overseas providers. Congress created a new, for-profit, governmental corporation called the United States Enrichment Corporation ("USEC") to provide those services to Edison and other domestic utilities.

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to clean it up than it would have cost to clean up the weapons pollution, right?

COUNSEL FOR EDISON: Exactly. Yes, Sir.

[3] The Utility Services Contract merely stated, in pertinent part, that:

> [T]he Customer and DOE desire to terminate all previous long-term contracts between the Customer and DOE for the furnishing of uranium enrichment services *in order to accommodate the Customer's desire to obtain such services under the Utility Services form of uranium enrichment services contract* . . . .

(Emphasis added.). That contract further provided that "the unit charge for enrichment services under this contract shall not exceed a ceiling charge of $135.00 per separative work unit through September 30, 1985."

The Settlement Agreement provided that "the Government agrees that all obligations arising under the [previous] contracts or by reason of their termination shall be deemed to be concluded."

At the same time that it created the USEC, Congress in EPACT addressed the need to decontaminate and decommission the government's uranium enrichment facilities. The DOE "estimated that the total cost of this clean up could exceed $20 billion over 40 years, which amounted to about $500 million per year, indexed to inflation." *Yankee Atomic*, 112 F.3d at 1572. As this court noted in *Yankee Atomic*, "[b]ecause [the magnitude of] this decontamination and decommissioning fiscal problem was not [fully] recognized until the 1980s, the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem." *Id.*

EPACT established a Uranium Enrichment Decontamination and Decommissioning Fund (the "Fund") to accumulate over a fifteen-year period the funds necessary to remediate the uranium enrichment facilities. 42 U.S.C. §§ 2297g, 2297g 1. The Act provided that the costs were to be shared by the government and those domestic utilities that benefited from processing at government facilities. The Act accordingly provided that the annual deposits of $480 million (adjusted for inflation) would come from two sources: (1) up to $150 million (or up to approximately 32% of the total amount) was to be collected as a special assessment from domestic utilities[4] that purchased (on the primary or secondary markets) the uranium enriched at these facilities; and (2) the balance of at least $330 million-the lion's share of the costs, amounting to at least 68%-was to be paid by the government. The Act further provided that the imposition of these special assessments on Edison and the other utilities would cease after the earlier of 15 years after October 24, 1992 (the date of EPACT's enactment) or the collection of

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[4] The implementing regulations for the Fund defined "domestic utility" as any utility in the United States that purchased SWUs from the government between 1945 and October 23, 1992. *See* 10 C.F.R. § 766.3. It is undisputed that Edison meets this definition.

$2.25 billion (again adjusted for inflation) from the domestic utilities. *See* 42 U.S.C. § 2297g-1.

Under the Act, the special assessment imposed on each domestic utility was based on the percentage of SWUs purchased from the DOE relative to the total number of SWUs produced by the DOE. 42 U.S.C. § 2297g-1(c). As noted above, the Act provided that a domestic utility was considered to have purchased a SWU from the DOE if the SWU was originally produced by the DOE, even if the utility actually purchased it from another source. Similarly, a utility was not considered to have purchased a SWU from the DOE if it subsequently resold that SWU to another utility. As this court noted in *Yankee Atomic*, "[i]n sum, the Act impose[d] the assessment upon whichever utility company eventually use [d] the enrichment services." 112 F.3d at 1572.

Two groups of purchasers of uranium enrichment services were exempt from the special assessment: (1) domestic utilities that purchased USEC services any time after 1992; and (2) foreign utilities, which represented 25% of DOE's pre-1992 customer base. *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 33 n. 1 (2000); *see also* Complaint at ¶ 25 (alleging that sales to foreign utilities historically "accounted for approximately 25% of the Government's commercial uranium enrichment market").

EPACT also provided the utilities with a "pass-through" provision, providing in pertinent part that the special assessment "shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." 42 U.S.C. § 2297g-1(g). This statutorily mandated pass-through provision was binding on state regulatory agencies. *See Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 369-72, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 962-65, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). At

oral argument, counsel for Edison conceded that Edison sought to recover the costs of the special assessment by passing the costs through to Edison's customers, though counsel expressed some doubt whether Edison recovered those costs in light of deregulation of the market and the competitive rates that deregulation produced.

The cost-sharing provisions were enacted after "much congressional debate over the issue of how these costs should be recovered, especially to what extent DOE's nuclear utility customers should be expected to share in paying for these costs." 138 Cong. Rec. H11,399, H11,401 (1992) (statement of Rep. Phillip Sharp on Conference Report), *reprinted in* Senate Comm. On Energy & Natural Res., 103d Congress 2d. Sess., *6 Legislative History of the Energy Policy Act of 1992*, at 4519, 4553 (Comm. Print 1994). Ultimately, the utilities' share was limited to 32% even though the House Report concluded that "[h]istorical production from these plants ha[d] been divided almost evenly between the government and commercial sectors." H.R.Rep. No. 102-474(I), at 144 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1967.

Indeed, Edison and other utilities participated actively in shaping the legislation that became EPACT and approved the concept of cost sharing. *See Comprehensive National Energy Policy Act: Hearings on H.R. 776 Before the House Comm. on Ways & Means*, 102d Cong. 170-83 (1992) ("Committee Hearings I"). During the course of EPACT's consideration, the House Committee on Energy and Commerce proposed to impose "a $419 million annual liability, or a $9 billion [liability] over 20 years," on the utility industry for remediation of the enrichment facilities. *Id.* at 181. In Edison's case the company estimated that this funding proposal, if enacted, would increase its uranium enrichment costs by "one third" over the amount it had already agreed to pay. *Id.*

In the hearings on EPACT, Edison's President complained that the industry was being asked to pay a "disproportionate share" of the costs, and, as in the present Complaint, stated that "virtually all the contamination at [the government enrichment] facilities occurred during the first 20 years of operations, when operations were strictly for the defense program." *Id.* at 180-81 (statement of Bide L. Thomas, President, Commonwealth Edison Co., *et al.*).[5] Edison offered no independent study of the industry's relative contribution to the contamination and relied entirely on the testimony of the Department of Energy. That testimony, by Assistant Secretary for Nuclear Energy William Young, was that "there is additional pollution in the area of the sites [of the enrichment facilities] because of commercial operations subsequent to the exclusive operation [of the facilities] for the government." *Department of Energy Budget Request for Fiscal Year 1993: Oversight Hearing Before the Subcomm. On Energy and the Env't of the House Comm. on Interior and Insular Affairs,* 102d Cong. 80 (1992) ("Committee Hearings II"). He estimated the remediation costs for that portion of the pollution attributable to the enrichment of the utilities' uranium amounted to approximately $1.6 billion, out of a total cost of approximately $18.5 billion. He concluded that "[i]f you look at it from a polluter-pays basis, about $1.6 billion of that $18.5 billion would be properly allocated to commercial customers" of the enrichment facilities. *Id.* at 79.[6]

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[5] This testimony was a joint statement of Bide L. Thomas; Michael R. Peevey, President, Southern California Edison Co.; and Joseph M. Farley, Chairman and Chief Executive Officer, Southern Nuclear Operating Co. *See id.* at 178.

[6] Assistant Secretary Young further explained this proposed allocation when questioned by Representative Kostmayer during his testimony:

> MR. KOSTMAYER: Who else did the polluting besides the government?

Based on Edison's view of the industry's responsibility for the contamination, Edison reaffirmed its and other utilities' "willingness to pay a fair share of the [decontamination and decommissioning costs] for these [enrichment] facilities." Committee Hearings I at 182; *see also id.* at 172 ("[T]he industry is willing to participate in the cleanup program . . . .") (testimony of Bide L. Thomas, President, Common-

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> MR. YOUNG: In some cases, there is additional pollution in the area of the sites because of [the] commercial operations subsequent to the exclusive operation for the government. Some of the tailings are there as a result of commercial operations, for example.
>
> MR. KOSTMAYER: Commercial operations conducted by some party other than the government?
>
> MR. YOUNG: No, no. We have run the diffusion plants. A certain amount of the tails are there because of [the] SWUs produced for the government. Another certain amount of the tails are there because of SWUs produced for commercial customers.
>
> . . .
>
> MR. YOUNG: . . . The largest piece of [the estimated total cleanup cost] is $14 billion which is [decontamination and decommissioning] of the buildings and systems themselves. Of that, because of the government operation having led to the contamination, we are saying the government would pay 100 percent of that.
>
> There are two other elements of the cleanup that has got to take place. One is on the grounds around the facilities and we are saying that some of the contamination that occurred in the ground resulted not solely from the 20 years of government operation, but a measurable amount more resulted from the commercial-or operation to the benefit of commercial customers. And since we did not pass those costs on in the past, we feel it is equitable to pass those costs on in the future.
>
> Further, with the tails, some of the tails were created for the benefit of commercial customers, and the portion that was, and again, not passed on in the past, we feel it is equitable to pass it on to commercial customers at this time.

Committee Hearings II at 80-81.

wealth Edison Company). But Edison and other utilities objected that their share should not exceed the $1.6 billion estimated by the Department of Energy, and sought "a cap to protect ratepayers from being assessed more than their fair share of costs." *Id.* at 181. Edison and other utilities urged Congress to adopt a compromise funding proposal-one adopted by the House Committee on Science, Space and Technology (the "Science Committee")—that would have capped the utilities' liability for the remediation costs at $2.5 billion. Edison and two other utilities stated, on behalf of themselves and two industry interest groups,[7] that:

> While $2.5 billion is significantly more than the $1.6 billion that DOE estimates the civilian sector should contribute [to the remediation of the enrichment facilities], *the industry is willing to accept this compromise in the interest of providing certain liability levels and to move forward with this restructuring legislation and [decontamination and decommissioning] program.*

*Id.* at 182. (Emphasis added.). The liability cap proposed by the Science Committee, which Edison viewed as protecting its ratepayers from paying more than "their fair share of [remediation] costs," essentially became the cap in the legislation that Edison now challenges, though the ultimate liability of the utilities under the enacted legislation was more certain than under the Science Committee proposal. *See* 42 U.S.C. § 2297g-1.

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[7] These interest groups were the American Nuclear Energy Council ("ANEC") and the Edison Electric Institute ("EEI"). ANEC "represents over 100 domestic and international organizations that have an interest in nuclear energy." EEI, in turn, "is the national association of investor-owned electric companies" and represents "approximately three-quarters of all American electricity customers." Committee Hearings I at 178.

Following the enactment of EPACT in 1992, as well as corresponding DOE regulations implementing EPACT, the government assessed Edison and similarly situated domestic utilities on an annual basis for each utility's share of the special assessment. Edison alleges that as of the date of the complaint, it had paid the government approximately $95.5 million in seven special assessments for the decontamination and decommissioning of the enrichment facilities. These special assessments covered the period from 1969, when Edison first began to purchase uranium processing services from the government, until 1992, the year of EPACT's enactment.

## PROCEEDINGS BELOW

On April 9, 1997, Edison commenced an action in the Court of Federal Claims challenging the legality of the special assessments authorized by the Act. Edison's original complaint alleged that the special assessment breached its contracts with the government by retroactively increasing the cost of the uranium enrichment services and constituted an impermissible taking of those contracts in violation of the Fifth Amendment. *See, e.g.,* Original Complaint of Plaintiff Appellant Commonwealth Edison Company at ¶¶ 53, 68-69. On May 6, 1997, during the pendency of Edison's action, this court issued its decision in *Yankee Atomic* rejecting identical claims made by another utility.

Following our decision in *Yankee Atomic*, Edison filed a new and separate action for declaratory and injunctive relief in the United States District Court for the Southern District of New York seeking to invalidate EPACT and to bar the government from attempting to compel future payments under the Act (the "New York action"). The district court subsequently denied a motion by the United States to transfer the case to the Court of Federal Claims. *Consol. Edison Co. v. United States*, 45 F.Supp.2d 331 (S.D.N.Y.1999). In

*Consol. Edison Co. v. United States, Dept. of Energy*, 247 F.3d 1378 (Fed.Cir.2001), we reversed that decision and instructed the district court to transfer the New York action to the Court of Federal Claims for adjudication.

On November 6, 1998, Edison also filed a motion in the Court of Federal Claims to stay proceedings in that court pending resolution of the New York action. On February 2, 1999, Edison amended its original complaint in the Court of Federal Claims to state new and additional theories for recovery. The amended complaint stated essentially three theories for recovery. Edison alleged that the special assessments imposed by EPACT: (1) constituted an unlawful taking of money under the Takings Clause of the Fifth Amendment; (2) constituted a breach of contract, inasmuch as "[t]he fixed price nature of [Edison's] enrichment contracts, coupled with the additional release granted by the Government pursuant to the termination of certain of those contracts, provided [Edison] with an unmistakable promise that it would not be subject to future liability to the Government based upon its contractual purchases of enrichment services"; and (3) constituted an illegal exaction in violation of the Due Process Clause of that amendment. The government moved to dismiss the amended complaint for failure to state a claim.

On February 3, 2000, the Court of Federal Claims denied Edison's motion for a stay, noting, in part, that the original action in the Court of Federal Claims was the first filed action and that it "has the jurisdiction to rule on each of the counts in the amended complaint and thus need not defer to the district court's broader jurisdiction." *Commonwealth Edison*, 46 Fed. Cl. at 34. In a well-reasoned opinion, the Court of Federal Claims also granted the government's motion to dismiss, concluding that neither the old nor new theories of recovery stated a claim. That court rejected Edison's first claim—that EPACT constituted an impermissible taking of

Edison's property without just compensation—on the ground that "a government-imposed payment of money cannot result in a compensable taking." *Id.* at 41.

The court dismissed the utility's claim that the imposition of the special assessments constituted a taking of its contract rights with the government, finding that "this issue was squarely addressed" in this court's decision in *Yankee Atomic*. *Id.* at 46. In reaching this conclusion, the court rejected Edison's arguments that its contracts with the government were significantly different from those contracts at issue in *Yankee Atomic*. *Id.*

Finally, the court rejected Edison's claim that the special assessment constituted an illegal exaction barred under the Due Process Clause. Recognizing the well-established principle that "an economic statute, such as the Energy Policy Act, comes to the court with a presumption of validity," *id.* at 43, the Court of Federal Claims determined that although the Act is indeed retroactive, "it cannot be said that the retroactivity of the Act is irrational or that that retroactivity unfairly impacted on the plaintiff." *Id.* at 44 (citing *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976)). The court further held that "the liability imposed by the special assessment is neither disproportional nor excessive," as EPACT imposed "liability only on those utilities that benefited from the government's uranium enrichment services." *Id.* at 45.

This timely appeal followed. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3).[8]

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[8] *Amicus Curiae* briefs in support of Edison were filed in this case by Sacramento Municipal Utility District and Maine Yankee Atomic Power Co.

## DISCUSSION

### I

As an initial matter, we note that the decision of the Court of Federal Claims to deny Edison's request for a stay of those proceedings pending resolution of the New York action is now moot, in light of our decision in *Consolidated Edison*, 247 F.3d 1378, in which we instructed the United States District Court for the Southern District of New York to transfer that action to the Court of Federal Claims.

Accordingly, the only question before us is whether the Court of Federal Claims erred in dismissing this action for failure to state a claim upon which relief may be granted. We review that decision without deference. *First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1286-87 (Fed.Cir.1999). In so doing, we also "assume that all well-pled factual assertions are true and make all reasonable inferences in favor of" Commonwealth Edison, *New Valley Corp. v. United States*, 119 F.3d 1576, 1580 (Fed.Cir.1997), to the extent that such allegations are relevant to the constitutional issues.

### II

Ever since the New Deal Supreme Court's discarding of the *Lochner* [9] line of substantive due process cases, the Court has repeatedly held that economic legislation "adjusting the burdens and benefits of economic life" is to be judged under a deferential standard. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). There remain, however, at least three areas in which judicial review of federal legislation imposing regulatory burdens still bites. Not surprisingly, Edison relies on each of these three theories.

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[9] *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905).

First, there are the takings cases, in which the government is alleged to have taken property without just compensation under the Fifth Amendment. The Supreme Court has made clear that government regulation can constitute a taking of property requiring compensation. *See, e.g., Lucas v. So. Carolina Coastal Council*, 505 U.S. 1003, 1027-28, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). It is also clear that a fund of money can be property protected under the Takings Clause. *See Phillips v. Washington Legal Found.*, 524 U.S. 156, 160, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998) (holding that interest income generated by funds held in IOLTA accounts is private property of the owner of the principal for purposes of the Takings Clause); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980) (holding that the Takings Clause can apply to monetary interest generated from the operation of a specific, separately identifiable fund of money). However, although a minority of the Supreme Court has urged that a taking can occur when Congress has imposed an obligation to pay money, *see Eastern Enterprises v. Apfel*, 524 U.S. 498, 537, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998), we are bound to follow the views of a majority of the Supreme Court.

In *United States v. Sperry Corp.*, 493 U.S. 52, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989), the Supreme Court held that a federal statute that required the payment of a portion of an arbitral award from the Iran-United States Claim Tribunal to the United States government did not violate the Takings Clause because, in part, "[i]t is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." *Id.* at 62 n. 9, 110 S.Ct. 387.

In *Eastern Enterprises*, five justices of the Court rejected the theory that an obligation to pay money constitutes a taking. There, the Supreme Court confronted a constitutional challenge to the retroactive liability provisions of the Coal

Industry Retiree Health Benefit Act of 1992, codified at 26 U.S.C. §§ 9701-9722 (the "Coal Act"). The Coal Act required coal operators such as petitioner Eastern Enterprises ("Eastern") to fund future health benefits of current and former coal mine employees. There was no majority opinion of the Supreme Court. Writing for the plurality, Justice O'Connor, joined by three other justices, concluded that the retroactive impact of the Coal Act as applied to Eastern Enterprises resulted in an unconstitutional taking of property because it placed a "severe, disproportionate and extremely retroactive burden on Eastern." *Eastern Enters.*, 524 U.S. at 538, 118 S.Ct. 2131.

Justice Kennedy in his concurrence, however, disagreed with the plurality's conclusion that the Coal Act resulted in an unconstitutional taking of property:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits.

*Id.* at 540, 118 S.Ct. 2131. The four dissenters in *Eastern Enterprises* (Justices Stevens, Souter, Ginbsurg, and Breyer) agreed that the Takings Clause was not implicated because "[t]he 'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property. . . . This case involves not an interest in

physical or intellectual property, but an ordinary liability to pay money. . . ." *Id.* at 554, 118 S.Ct. 2131 (Citations omitted.).

Thus five justices of the Supreme Court in *Eastern Enterprises* agreed that regulatory actions requiring the payment of money are not takings.[10] We agree with the prevailing view that we are obligated to follow the views of that majority.

This court has similarly concluded that the imposition of an obligation to pay money does not constitute an unconstitutional taking of property. In *Atlas Corp. v. United States*, 895 F.2d 745 (Fed.Cir.), *cert. denied*, 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990), for example, we considered the constitutionality of the Uranium Mill Tailings Radiation

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[10] *See Parella v. Ret. Bd. of the R.I. Employees' Retirement Sys.*, 173 F.3d 46, 58 (1st Cir.1999) (upholding state statute temporarily withholding excess retirement benefits against a Takings Clause challenge because "a majority of justices found that the Takings Clause did not apply under the facts of *Eastern Enterprises*, because they concluded that a Takings Clause issue can arise only after a plaintiff's property right has been independently established"); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 659 (3d Cir.) ("[W]e are bound to follow the five-four vote against the takings claim in Eastern."), *cert. denied*, 528 U.S. 963, 120 S.Ct. 396, 145 L.Ed.2d 309 (1999); *Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir.1999) (following Supreme Court in holding Takings Clause inapplicable to the Coal Act because five Justices in *Eastern Enterprises* reasoned that "no identifiable property interest was infringed by the legislation"), *cert. denied*, 528 U.S. 1117, 120 S.Ct. 936, 145 L.Ed.2d 814 (2000); *but see U.S. Fidelity & Guar. Co. v. McKeithen*, 226 F.3d 412, 416 (5th Cir.2000) (citing *Eastern Enterprises* but analyzing a Takings Clause challenge to retroactive assessments under the Louisiana Workers' Compensation Fund under *ad hoc*, fact-specific factors), *cert. denied*, ___U.S.___, 121 S.Ct. 1360, 149 L.Ed.2d 289 (2001); *United States v. Hercules, Inc.*, 247 F.3d 706, 722 (8th Cir.2001) (stating that "inquiry into the constitutionality of CERCLA . . . would be 'essentially ad hoc and fact intensive'" (quoting *Eastern Enterprises*, 524 U.S. at 523, 118 S.Ct. 2131)).

Control Act ("UMTRCA"), Pub.L. No. 95-604, 92 Stat. 3021 (1978), which required that uranium producers spend large sums of money to clean up uranium tailings piles, a by-product of uranium manufacture. We held that the UMTRCA's imposition of the obligation to pay money to clean up the tailings piles did not constitute an unconstitutional taking of property under the Takings Clause:

> In this case, [the uranium producer] has not alleged a physical taking of any of its property. Its complaint alleges only that it will be required to spend sums of money for reclamation of tailings and mill decommissioning. Requiring money to be spent is not a taking of property.

*Id.* at 756 (citing *United States v. Sperry Corp.*, 493 U.S. 52, 62 n. 9, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989)).

In short, while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment.

III

The second area, represented by the Supreme Court's decision in *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), involves contracts in which the government has agreed to pay damages if it engages in certain types of regulation.

A similar contract claim was made with respect to the present contracts and rejected by this court in *Yankee Atomic*. In that case, this court was confronted with a claim that the special assessments imposed under EPACT breached the utility's fixed-price contracts with the government by, "in effect, retroactively increasing the price that it must pay for the previously supplied uranium enrichment services." 112 F.3d at 1573. Relying on the analysis prescribed by the

Supreme Court's decision in *Winstar*, we held that the imposition of the special assessments was a lawful exercise of Congress's taxing power under the sovereign acts doctrine, and was not designed to retroactively increase the price of the government's earlier contracts with Yankee Atomic. *Id.* at 1575. In other words, this court concluded that the special assessments constituted "a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services." *Id.* at 1577.

We further held that because the contracts between the plaintiff in that case and the government "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services," *id.* at 1580, the special assessments imposed by the Act did not constitute a breach of contract. We similarly disposed of the plaintiff's takings claim by concluding that "[b]ecause the contracts did not contain an unmistakable promise against a future assessment, [the utility] had no property right (via a vested contract right) which was subsequently taken by the assessment." *Id.* at 1580 n. 8. This court denied Yankee Atomic's motion to rehear the case in banc, 112 F.3d 1569 (Fed.Cir.1997), and the Supreme Court denied certiorari, 524 U.S. 951, 118 S.Ct. 2365, 141 L.Ed.2d 735 (1998).

We reject Edison's request that we distinguish our decision in *Yankee Atomic*. There is no meaningful difference between the contract theories asserted here and in *Yankee Atomic*, and we therefore agree with the Court of Federal Claims' conclusion that Edison's claims based on its contracts with the government are barred by that decision. This also disposes of Edison's argument that the Act constitutes a taking of Edison's supposed contract rights to be free of future government assessments.

## IV

The third area of judicial review occurs where a regulation is retroactive and accordingly implicates the Due Process Clause. The Supreme Court has made clear that federal legislation is to be construed to avoid retroactivity.[11] No such issue is presented here since the statute is clear on its face, and no party urges that a narrowing construction is either possible or appropriate. Accordingly, we must address the Due Process issue.

The standard of review in this area is well-settled. As the Supreme Court stated in *Turner Elkhorn*, 428 U.S. at 15, 96 S.Ct. 2882, "[i]t is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." So too the Supreme Court observed in *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984):

> Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches.

*Id.* at 729, 104 S.Ct. 2709 (citing *Turner Elkhorn*, 428 U.S. at 15-16, 96 S.Ct. 2882). Where the basis for the challenge is

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[11] *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) ("Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) ("[C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result.").

retroactivity, the Supreme Court has held that Due Process is satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730, 96 S.Ct. 2882.

In judging the rationality of legislation under the Due Process Clause, an evidentiary trial of facts, such as the relative contributions of weapons processing and utility fuel processing to the total contamination at the government plants, is not required. Rather, as the Supreme Court has noted in another context:

> the question is whether the legislative conclusion [to enact the statute] was reasonable and supported by substantial evidence in the record before Congress. In making that determination, we are not to re-weigh the evidence *de novo,* or to replace Congress' factual predictions with our own. Rather, we are simply to determine if the standard [of review] is satisfied. If it is, summary judgment . . . is appropriate regardless of whether the evidence is in conflict.

*Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) (Citations omitted.). In short, legislative facts control the analysis. In these Due Process cases the federal courts are not assigned the task of making policy, determining a fair outcome, or determining the actual state of facts. We are charged simply with determining whether the congressional action was rational.

Under that rational purpose standard it will be a rare-circumstance where federal legislation that is retroactive will be held unconstitutional under the Due Process Clause. In the modern era this has occurred on only a very few occasions, even if we count *Eastern Enterprises* as being such a case. *See Nichols v. Coolidge*, 274 U.S. 531, 47 S.Ct. 710, 71 L.Ed. 1184 (1927); *Blodgett v. Holden*, 275 U.S. 142, 48 S.Ct. 105, 72 L.Ed. 206 (1927) (*per curiam*); *R.R. Ret.*

*Bd. v. Alton R.R. Co.*, 295 U.S. 330, 55 S.Ct. 758, 79 L.Ed. 1468 (1935); *Eastern Enters.*, 524 U.S. 498, 118 S.Ct. 2131, 141 L.Ed.2d 451.[12]

The cases that invalidated these statutes were most unusual.

Both *Blodgett v. Holden* and *Nichols v. Coolidge* involved the government's retroactive application of revenue statutes to transactions made well before the enactment of the respective statutes. The Supreme Court held in both cases that such retroactive application violated due process. *Blodgett*, 275 U.S. at 147, 48 S.Ct. 105; *Nichols*, 274 U.S. at 542-43, 47 S.Ct. 710.[13]

In *United States v. Carlton*, 512 U.S. 26, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994), the Court questioned the continuing relevance of those decisions to present day challenges to retroactive statutes, concluding that "[t]hose cases were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded." *Id.* at 34, 114 S.Ct. 2018. In any event those decisions were limited to situations involving a "wholly new tax." *Id.* EPACT, unlike the statutes at issue in those two cases, is not a mere revenue-raising measure. Rather, it represents an assessment on particular existing domestic utilities, which Congress concluded benefited from the government's operation of the uranium enrichment facilities,

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[12] *Cf. United States v. Sec. Indus. Bank*, 459 U.S. 70, 78-82, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982) (declining to retroactively construe a provision of the Bankruptcy Reform Act, Pub.L. No. 95-598, 92 Stat. 2549 (1978), without clear evidence of Congressional intent to apply that statute retroactively, and expressing "substantial doubt whether the retroactive" application would "comport with the Fifth Amendment").

[13] *Untermyer v. Anderson*, 276 U.S. 440, 48 S.Ct. 353, 72 L.Ed. 645 (1928), involved a challenge to the same statute at issue in Blodgett, and reached the same result.

and which Congress also concluded were themselves partially responsible for the problem the statute seeks to remedy.

In *Alton*, the Court invalidated a statute that required railroads to establish a pension fund covering both current employees and former employees who had worked for the railroad within the year before passage of the statute because of the retroactive effect of the statute. *Alton* bears little resemblance to this case, and it appears that *Alton*, in any event, has effectively been overruled. *See Pension Benefit*, 467 U.S. at 733, 104 S.Ct. 2709 (questioning whether *Alton* "'retains vitality' despite the changes in judicial review of economic legislation that have occurred in the ensuing years"); *see also Turner Elkhorn*, 428 U.S. at 19, 96 S.Ct. 2882. We note that neither Edison nor any of its *amici* relies on *Alton*.

*Eastern Enterprises*, which is the focus of the parties' attention, is also starkly different from this case. There, the employees' claims of entitlement to the payment of future health benefits arose from a number of National Bituminous Coal Wage Agreements ("NBCWAs" or "Agreements") between the employees' union and various coal mine operators. The statute in *Eastern Enterprises* was justified on the ground that expectations of future benefits had been created by these agreements. A majority of the Court concluded that the obligation to pay benefits could not be imposed on companies that had no role in creating those expectations.

The plurality noted that Agreements negotiated in 1974, 1978, and subsequently first suggested an industry commitment to the funding of health benefits for former employees and their dependents. *Eastern Enters.*, 524 U.S. at 530, 118 S.Ct. 2131. The plurality emphasized, however, that Eastern "ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the [employees'] Benefit Plans under the

1974, 1978 or subsequent NBCWA's." *Id.* Under the particular facts of that case, the plurality accordingly reasoned that the Coal Act's retroactive provisions violated the Takings Clause of the Fifth Amendment. In his concurrence, Justice Kennedy agreed with the plurality that the particular facts of the case warranted the invalidation of the statute, but based his reasoning on Due Process grounds. He wrote:

> Eastern was once in the coal business and employed many of the beneficiaries, but it was not responsible for their expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation was created by promises and agreements made long after Eastern left the coal business. Eastern was not responsible for the resulting chaos in the funding mechanism caused by other coal companies leaving the framework of the [NBCWA]. This case is far outside the bounds of retroactivity permissible under our law.

524 U.S. at 550, 118 S.Ct. 2131 (Kennedy, J., concurring).

Even if the *Eastern Enterprises* plurality and concurrence could be read together to announce a binding holding on the Due Process issue,[14] this case does not involve the imposition of liability on companies having no responsibility for creating the expectation of a future benefit. Rather, it involves a congressional determination to impose liability on companies that received a benefit, the production of which benefit contributed to a societal problem.

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[14] The District of Columbia Circuit has concluded that the plurality and concurrence in *Eastern Enterprises* cannot be combined into a single holding on the Due Process issue. *Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254-55 (D.C.Cir.1998) ("Justice Kennedy's concurrence in the judgment is of no help in appellant's efforts to cobble together a due process holding from *Eastern Enterprises*' fragmented parts. . . . Justice Kennedy's due process reasoning can in no sense be thought a logical subset of the plurality's takings analysis.").

On the other side of the balance, on more than ten occasions, the Supreme Court has rejected challenges to economic legislation based on the Due Process Clause of the Fifth Amendment. *See United States v. Carlton*, 512 U.S. 26, 35, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994) (upholding a retroactive amendment to the federal estate tax, even though the taxpayer received no advance notice of the amendment and relied to his detriment on pre-amendment law); *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 636-41, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993) (upholding retroactive withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act ("MPPAA") which assessed employer nearly $300,000 for its withdrawal from a pension plan prior to the effective date of the MPPAA); *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 191-92, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992) (finding that Michigan workers' compensation statute did not violate the Due Process Clause, even though it required the petitioners to pay nearly $25 million for retroactive benefits to disabled employees); *United States v. Sperry Corp.*, 493 U.S. 52, 64-65, 110 S.Ct. 387, 107 L.Ed.2d 290 (1989) (upholding retroactive imposition of an arbitration fee on prevailing parties before the Iran United States Claim Tribunal); *United States v. Hemme*, 476 U.S. 558, 571, 106 S.Ct. 2071, 90 L.Ed.2d 538 (1986) (rejecting Due Process challenge to statutorily-prescribed transitional rule that retroactively applied to gifts made before enactment of rule); *United States v. Locke*, 471 U.S. 84, 105-06, 105 S.Ct. 1785, 85 L.Ed.2d 64 (1985) (upholding the retroactive application of the filing requirements of the Federal Land Policy and Management Act of 1976 ("FLPMA"), codified at 43 U.S.C. § 1744, that resulted in the forfeiture of mining claims made before the enactment of the FLPMA); *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 475-79, 105 S.Ct. 1441, 84 L.Ed.2d 432 (1985) (upholding legislation requiring private railroads to reimburse Amtrak for

rail travel privileges provided by Amtrak to the private railroads' employees and former employees even though Amtrak for some years had not imposed such costs on the private railroads); *Pension Benefit*, 467 U.S. at 731-32, 104 S.Ct. 2709 (upholding the retroactive application of the withdrawal liability provisions of the MPPAA during period before the MPPAA's enactment); *United States v. Darusmont*, 449 U.S. 292, 296-302, 101 S.Ct. 549, 66 L.Ed.2d 513 (1981) (upholding the retroactive application of an amendment to the federal tax statute to transactions made before enactment of amendment); *Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. 2882 (upholding requirement that coal mine operators compensate former employees disabled by work-related illnesses, even though those operators had never contracted for such liability, and the employees involved were no longer employed by the operators); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 3 L.Ed.2d 132 (1958) (upholding application of statutory requirement that occupants of mortgaged housing must be residents as opposed to transients to apartment buildings mortgaged prior to enactment of the statute); *Lichter v. United States*, 334 U.S. 742, 788, 68 S.Ct. 1294, 92 L.Ed. 1694 (1948) (upholding statute permitting government to require private parties to pay excessive profits realized during wartime to the government); *Welch v. Henry*, 305 U.S. 134, 146-51, 59 S.Ct. 121, 83 L.Ed. 87 (1938) (sustaining retroactive Wisconsin statute that taxed shareholder dividends paid two years before statute's enactment); *Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 167-68, 54 S.Ct. 134, 78 L.Ed. 243 (1933) (upholding retroactive application of statute providing that interest be added to damages awards for breach of contract claims); *Milliken v. United States*, 283 U.S. 15, 21-24, 51 S.Ct. 324, 75 L.Ed. 809 (1931) (upholding retroactive application of federal estate tax statute to tax gifts made prior to enactment of the statute). In *Eastern Enterprises*, both the plurality and Justice Kennedy suggested that liability for

health care costs limited to miners formerly employed by the companies could be retroactively imposed, presumably because the companies benefited from their services, and the performance of those services contributed to the health problems.[15] Significantly, other courts of appeals have rejected claims that similar retroactive effects of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.*, ("CERCLA") violate Due Process. *See United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir.1986), *cert. denied*, 484 U.S. 848, 108 S.Ct. 146, 98 L.Ed.2d 102 (1987); *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir.1988), *cert. denied*, 490 U.S. 1106, 109 S.Ct. 3156, 104 L.Ed.2d 1019 (1989); *Franklin County Convention Facilities Auth. v. Am. Premier Underwriters, Inc.*, 240 F.3d 534, 551-52 (6th Cir. 2001).[16] And we also have repeatedly rejected Due

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[15] *See Eastern Enters.*, 524 U.S. at 536, 118 S.Ct. 2131 ("Eastern might be responsible for employment-related health problems of all former employees whether or not the cost was foreseen at the time of employment . . . .") (plurality opinion); *id.* at 549, 118 S.Ct. 2131 (noting that the Supreme Court has "upheld the imposition of liability on former employers based on past employment relationships") (Kennedy, J., concurring); *see also Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. 2882 ("[T]he imposition of liability for the effects of disabilities bred in the past is justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor. . . .").

[16] These courts have reasoned that "[c]leaning up inactive and hazardous waste disposal sites is a legitimate legislative purpose, and Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole." *Northeastern Pharm.*, 810 F.2d at 734. *See also, e.g., O'Neil v. Picillo*, 883 F.2d 176, 183 n. 12 (1st Cir.1989), *cert. denied sub nom. American Cyanamid Co. v. O'Neil*, 493 U.S. 1071, 110 S.Ct. 1115, 107 L.Ed.2d 1022 (1990); *United States v. R.W. Meyer, Inc.*, 889 F.2d 1497, 1506 (6th Cir.1989), *cert. denied*, 494 U.S. 1057, 110 S.Ct. 1527, 108 L.Ed.2d 767 (1990); *Long Beach Unified Sch. Dist. v. Godwin Cal. Living Trust*, 32 F.3d 1364, 1366 (9th Cir.1994).

Process challenges to retroactive federal statutes. *See, e.g., Atlas*, 895 F.2d at 756 (upholding retroactive legislation requiring uranium producers to spend large sums of money to clean up uranium tailings piles).

Not surprisingly, in light of this history, the Supreme Court has repeatedly advised us that such Due Process challenges will only succeed in the rarest of cases. As Justice Kennedy noted in *Eastern Enterprises*, "[s]tatutes may be invalidated on due process grounds only under the most egregious of circumstances." 524 U.S. at 550, 118 S.Ct. 2131.

Although such "most egregious circumstances" do not exist *unless* the legislation is severely retroactive, they do not exist *merely because* the legislation is severely retroactive and costly, as is the case here. Without attempting to define exactly when retroactive legislation will be held unconstitutional, we perceive that the imposition of even severe retroactive obligations for past acts will be found rational and will be held constitutional under the Due Process Clause if two conditions are satisfied: (1) Congress reasonably concluded that the party subjected to retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations. It may well be that legislation is constitutional if either of the two conditions is satisfied, but we need not decide that question in this case. Both of those conditions are present.

The first is easily disposed of. Whether or not Edison received the enrichment services below cost from the government, as the government asserts, it certainly benefited from the government's provision of enrichment services. Edison admits that it received a benefit from the government's enrichment services (though it claims to have fully

compensated the government for the benefit).[17] Indeed, Edison could hardly have operated nuclear reactors without the benefit of uranium enrichment services from the United States government or some other approved source.

Congress could reasonably conclude that the processing of the utilities' uranium contributed to a societal problem (processing plant pollution) on two separate theories. First, while the weapons processing may have fully contaminated the buildings at the plants, the utility processing contributed to increased costs associated with decontaminating the grounds around the facilities and disposing of the tails. Second, whether or not the utility processing marginally increased the remediation costs, Congress could reasonably conclude that the later pollution should bear a share of the costs. Edison and utility industry groups themselves contributed to Congress' conclusion that the utilities were responsible by explicitly recognizing in the course of the legislative consideration that it would be fair to impose a share of the remediation costs on the utilities. *See ante* at 1334-36. The Court of Federal Claims does not sit to retry as a factual matter the reasonableness of such congressional judgments.[18]

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[17] *See* Brief for Plaintiff Appellant Commonwealth Edison Co. at 62 ("Although Commonwealth Edison obviously received a 'benefit' when it obtained enrichment services from the government, it paid a price agreed between the parties to represent the fair value of that benefit.").

[18] Even if the legislative history here were devoid of support for Congress' conclusions, it would not, of course, be "significant for due process purposes that the legislative history" did not address the issue of causation. *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1256 n. 7 (D.C.Cir.1998). "[T]he government can create a rational explanation *ex post* to support a statute attacked on due process grounds. That being so, we can hardly require a showing that Congress specifically identified [the] cause of the problem before it passed the [Act] in order to sustain the Act under rational basis review." *Id. See also FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d

The remediation costs imposed on Edison and the other domestic utilities also are not severely disproportionate; these utilities are obligated to pay only about a third of the remediation costs, even though evidence was presented that the "production from these plants ha[d] been divided almost evenly between the government and commercial sectors." H.R.Rep. No. 102-474(I), at 144 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1967.[19] In *Pension Benefit*, 475 U.S. at 225-26, 106 S.Ct. 1018, for example, the Supreme Court held that the Multiemployer Pension Plan Amendments Act of 1980, 94 Stat. 1208 ("MPPAA") did not constitute an unconstitutional taking of property under the Takings Clause of the Fifth Amendment because "[t]here is nothing to show that the [retroactive] withdrawal liability actually imposed on an employer will always be out of proportion to its experience with the plan, and the mere fact that the employer must pay money to comply with the [MPPAA] is but a necessary consequence of the MPPAA's regulatory scheme." *Id.* The mere fact that foreign utilities are exempted from the assessment also does not mean that the liability imposed on the domestic utilities is severely disproportionate. *See Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998); *Holland v. Keenan Trucking Co.*, 102 F.3d 736, 741-42 (4th Cir.1996).

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211 (1993) ("[B]ecause we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason . . . actually motivated the legislature. Thus, the absence of 'legislative facts' . . . has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom factfinding. . . .") (Citations omitted.).

[19] Amici Sacramento Municipal Utility District and Maine Yankee Atomic Power Company urge that a small portion of the Fund (approximately $75 million) has been used for thorium cleanup for which the utilities were not responsible. Considering that $7.2 billion was authorized for the Fund, *see* 42 U.S.C. § 2297g-1(a), (d), this *de minimus* diversion of funds does not affect our analysis.

This conclusion standing alone may be sufficient to warrant rejection of Edison's Due Process argument. The Supreme Court has held that it is rational for Congress to impose costs for certain activities on "those who have profited from the fruits of" activities that contributed to a societal problem, *Turner Elkhorn*, 428 U.S. at 18, 96 S.Ct. 2882, and that "our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations," *id.* at 16, 96 S.Ct. 2882. However, Edison also has failed to establish that the retroactivity violated the utilities' reasonable expectations. That issue requires more extensive discussion.

V

One of the key questions in the Supreme Court's retroactivity decisions is whether the regulated party could have reasonably expected that it would be free from the regulatory exaction. Those decisions suggest that if the regulated party could have reasonably expected that it would be subject to regulation, there can be no constitutional Due Process violation. *See, e.g., Concrete Pipe & Prods. of Cal.*, 508 U.S. at 646, 113 S.Ct. 2264.[20] This critical theme was reiterated by each of the separate opinions in *Eastern Enterprises*. There the question was directed to reasonable expectations at the time that Eastern operated coal mines. The plurality concluded that the Coal Act constituted an impermissible taking because, in part, it "substantially interferes with Eastern's reasonable investment-backed expectations." *Eastern Enters.*, 524 U.S. at 532, 118 S.Ct. 2131. In reaching this conclusion, the plurality emphasized,

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[20] *Cf. Rogers v. Tennessee*, 532 U.S. 451, 121 S.Ct. 1693, 1700-01, 149 L.Ed.2d 697 (2001) (retroactive judicial abolition of archaic common law rule, which precluded murder conviction where victim did not die within year and a day of stabbing, was not unexpected under prior law, and thus did not violate Due Process).

in part, that Eastern had left the coal mining industry and had ceased to employ miners years before "lifetime medical benefits . . . [could] have been viewed as promised" by the industry. *Id.* at 535, 118 S.Ct. 2131.

Justice Kennedy, on Due Process grounds, agreed with the plurality that the three-factor regulatory takings analysis set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), including investment-backed expectations, was relevant to the analysis of the Coal Act's retroactivity. *Eastern Enters*, 524 U.S. at 547, 118 S.Ct. 2131 (Kennedy, J., concurring). He sustained Eastern's challenge to the Coal Act, in part, because the miners' expectations of future health benefits were "created by promises and agreements made long after Eastern left the coal business." *Id.* at 550, 118 S.Ct. 2131.

The dissenters likewise focused on Eastern's reasonable expectations to conclude that "the historical circumstances, taken together, prevent Eastern from showing that the Coal Act's 'reachback' liability provision so frustrates Eastern's reasonable settled expectations as to impose an unconstitutional liability." *Id.* at 559, 118 S.Ct. 2131. Thus, in *Eastern Enterprises* there was remarkable agreement on the reasonable expectations standard, if not its application to the particular case.

In addressing the issue of reasonable expectations here, we must separate the government as sovereign from the government as contracting party. The question, in other words, is not what Edison could expect the United States as contracting party to do but what it could reasonably expect the United States as sovereign to do. *See United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996). Nor does the question require an evidentiary trial. Edison's subjective expectations are irrelevant. The question is what a reasonable company in Edison's position should have anticipated.

VI

The cases suggest three factors relevant to a determination of a party's reasonable expectations. First, was the company operating in a highly regulated industry? Second, did the company know of the problem at the time it engaged in the activity? Third, in the light of the regulatory environment at the time of the activities, could the possibility of the assessments have been reasonably anticipated? We conclude that each of these three factors is present here, and therefore we do not need to decide whether the presence of only one of these factors, without more, suffices to establish a lack of reasonable expectations.

Operation in a Highly Regulated Industry

First, it is undisputed that Edison operates in a highly regulated industry. As has been noted, "the production of energy from nuclear sources is one of the most highly regulated human activities." Peter Riley, *Legal Control of Nuclear Energy Between States*, 21 Cal. W. Int'l L.J. 303, 303 (1991).

We have previously held that participants in this highly regulated field can expect liability for remediation costs. Thus, in *Atlas*, 895 F.2d at 745, we considered the constitutionality of the UMTRCA, codified at 42 U.S.C. §§ 2022, 2113, 2114, 7901-7942, which required that uranium producers spend large sums of money to clean up uranium tailings piles. We held that the Court of Federal Claims had properly dismissed the complaint for failure to state a claim:

> From the outset of the uranium procurement program, the nuclear industry has been highly regulated, as the plaintiffs admit. "Those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly*, 475 U.S. at 227, 106 S.Ct. 1018,

> quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91, 79 S.Ct. 141, 146, 3 L.Ed.2d 132 (1958). The only "expectation" that [the processors] could have under the circumstances it has alleged is that it expected it would not have to spend its own money to remediate health and environmental hazards created by its production of uranium. Such an expectation cannot be a reasonable commercial expectation.

*Id.* at 758. This holding was directly supported by the Supreme Court's decision in *Connolly*, in which the Court concluded that the imposition of withdrawal liability from a multiemployer pension plan on certain employers did not interfere with the company's reasonable expectations because, in part, the companies were well aware that "[p]ension plans . . . were the objects of legislative concern," and "it was clear" to those companies operating in that highly regulated industry that withdrawal liability could be retroactively imposed. 475 U.S. at 226-27, 106 S.Ct. 1018. We are aware of no case to the contrary.

Edison's Knowledge of the Hazards of the Uranium Processing

Second, it is undisputed that all parties here were aware of the hazardous nature of the materials. In its amended complaint, Edison admitted that the need to decontaminate and decommission the facilities "was an obligation well understood by operators of nuclear facilities throughout the industry." Complaint at ¶ 31. Likewise, counsel for Edison conceded at oral argument here that "[i]t was recognized from way back in the 1950s that there would be decontamination and decommissioning costs" arising from the operation of the uranium processing facilities.

A number of Supreme Court decisions make clear that company knowledge of the dangers present in their operations is relevant to a determination of reasonable expectations. In

*Turner Elkhorn*, for example, the Supreme Court noted that the coal mine operators had "been aware of the danger of pneumoconiosis for at least 20 years. . . ." 428 U.S. at 17, 96 S.Ct. 2882. So too in *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 112 S.Ct. 1105, 117 L.Ed.2d 328 (1992), the Supreme Court ruled that a retroactive 1987 Michigan workers' compensation statute had not "unreasonably interfered with closed transactions" because the employers "knew they were taking a risk in reducing benefits to their workers, but they took their chances with their interpretation of the 1981 law." *Id.* at 191-92, 112 S.Ct. 1105.[21]

The Regulatory Environment

Finally, the regulatory environment is pertinent. We first consider the regulatory environment at the time when Edison received uranium enrichment services from the government. This focus on the regulatory climate at the time of the processing is supported not only by the Due Process cases discussed above but also by the regulatory takings cases.

The *Eastern Enterprises* plurality judged reasonable expectations for purposes of the takings analysis at the time of the relevant activity. *Eastern Enters.*, 524 U.S. at 532, 118 S.Ct. 2131. So too in *Pension Benefit*, 475 U.S. 211, 106 S.Ct. 1018, 89 L.Ed.2d 166, for example, the Supreme Court rejected the employer's takings claim that money had been taken unconstitutionally because, in part, it found that:

> Pension plans, however, were the objects of legislative concern long before the passage of ERISA in 1974 . . . . Prudent employers then had more than sufficient notice not only that pension plans were currently regulated, but

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[21] Other courts of appeals have also rejected challenges to CERCLA's retroactivity because, in part, "it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment." *Monsanto Co.*, 858 F.2d at 174.

> also that withdrawal itself might trigger additional financial obligations.

*Id.* at 226-27, 106 S.Ct. 1018.[22]

Where a Due Process violation is alleged because the government has ordered the payment of money, we think that reasonable expectations are to be judged as of the point at which the complaining party entered into the activity that triggered the obligation—here the submission of uranium for processing. We have no doubt that the utilities were on notice of the possible imposition of remediation liability at the times when the material was submitted for processing.

We first address the period following the enactment in 1980 of CERCLA, when the utilities should have been aware that statutory liability might be extended to cover other hazardous substances.[23]

CERCLA is a broad, remedial statute enacted by Congress in order to ensure "that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." *Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 285 (2d Cir.1992)

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[22] Where a regulatory taking of real property is alleged, the state cannot defeat liability simply by showing that the current owner was aware of the regulatory restrictions at the time that the property was purchased. *See Palazzolo v. Rhode Island*, 533 U.S. 606,___, 121 S.Ct. 2448, 2462, 150 L.Ed.2d 592 (2001). As Justice O'Connor's concurring opinion in *Palazzolo* makes clear, however, even in that context the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations. *Id.* at 2465-66.

[23] CERCLA liability only attached to cleanup costs arising from the remediation of substances defined to be "hazardous substances" under CERCLA and the Environmental Protection Agency's implementing regulations. 42 U.S.C. § 9601(14); 40 C.F.R. § 302.4 (listing, *inter alia*, arsenic, lead, mercury and methane as hazardous substances). There is no dispute here that the uranium was a "hazardous substance" under CERCLA.

(quoting S.Rep. No. 96-848, at 13 (1980)). Under CERCLA, the Environmental Protection Agency ("EPA") is authorized to undertake remedial efforts to clean up hazardous waste spills, and, where an "imminent and substantial endangerment to the public health exists," to take legal action in order to compel potentially responsible parties to undertake their own private cleanup efforts. *Gen. Elec. Co.*, 962 F.2d at 285; 42 U.S.C. § 9606(a).

There are several aspects of CERCLA of immediate relevance here:

> "CERCLA is a strict liability statute, one of the purposes of which is to shift the cost of cleaning up environmental harm from the taxpayers to the parties who benefited from the disposal of the wastes that caused the harm." *In re Bell Petroleum Servs.*, 3 F.3d 889, 897 (5th Cir.1993); *see also United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373, 1378 (8th Cir.1989).

CERCLA by its terms has unlimited retroactivity. Indeed, every court of appeals to consider the question has concluded that Congress intended CERCLA to apply retroactively. *See, e.g., Northeastern Pharm.*, 810 F.2d at 732; *Monsanto*, 858 F.2d at 174.

While the statute does cap those costs that may be imposed on current and former owners and other potentially responsible parties, those caps are quite high. *See* 42 U.S.C. § 9607(c). For example, the liability for the release of a hazardous substance from a facility is "the total of all costs of response plus $50,000,000 for any damages . . . ." § 9607(c)(1)(D).

Costs may be imposed on any current or former property owner or other potentially responsible party. *See Monsanto*, 858 F.2d at 167. Under CERCLA's liability provision, responsible parties include those who arrange for the

treatment of hazardous substances. A party may be liable under CERCLA for the arrangement for treatment of any "hazardous substances owned or possessed by [that party] . . . at any facility owned or operated by another party or entity and containing such hazardous substances. . . ." *Id.*[24]

This type of "arranger liability" may be imposed even if the party who arranges for the treatment of the hazardous substance does not actually perform the treatment. In *Aceto*, 872 F.2d 1373, for example, the Eighth Circuit held, *inter alia*, that the defendants which hired another company to formulate their technical grade pesticides into commercial grade pesticides, would be liable as an arranger under CERCLA if it were established that the defendants owned the technical grade pesticides and the final product and, in addition, knew that the generation of hazardous wastes was inherent in the formulation process. *Id.* at 1381-82.[25]

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[24] Section 9607(a)(3) imposes liability for "all costs of removal or remedial action incurred by the United States Government or a State" on:

> [A]ny person who, *by contract*, agreement, or otherwise *arranged* for disposal or *treatment*, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, *by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances* . . . .

42 U.S.C. § 9607(a)(3) (Emphases added.).

[25] Numerous other courts of appeals have approved the holding in *Aceto*. *See, e.g., Jones-Hamilton Co. v. Beazer Materials & Servs., Inc.*, 973 F.2d 688, 695 (9th Cir.1992).

Edison and the supporting *amici* unsuccessfully attempt to limit the reach of *Aceto*, based on decisions from other courts of appeals suggesting that that case would not extend to other situations, for example, situations in which the utilities merely arranged for the transportation of hazardous substances, *see United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1232 (6th Cir.1996), and *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 751 (7th Cir.1993), *cert. denied*, 510 U.S. 1044, 114 S.Ct. 691, 126 L.Ed.2d 658 (1994), or the material submitted for processing was not

In other words, by 1980, Edison could have reasonably expected that the enrichment of its uranium by an independent contractor (the United States) could result in the passage of legislation retroactively imposing liability for a portion of the remediation costs on Edison and the other utilities that benefited from the processing facilities.

Even before the enactment of CERCLA in 1980 liability-imposing regulations were either already in place, or could have been anticipated. CERCLA was not an unheralded statute. Federal statutes enacted in the 1960s and 1970s imposed obligations on the federal government to develop and maintain certain minimum standards for clean air, *see* "Clean Air Act" of 1963, Pub.L. No. 88-206, 77 Stat. 392, codified at 42 U.S.C. §§ 7401-7642, and clean water, *see* Federal Water Pollution Control Act Amendments of 1972, Pub.L. No. 92-500, 86 Stat. 816, codified as amended at 33 U.S.C. §§ 1251-1376 (the "Clean Water Act" of 1972). In 1970, Congress enacted the National Environmental Policy Act, Pub.L. No. 91-190, 83 Stat. 852 (1970), codified at 42 U.S.C. §§ 4321-4370a, which required all federal agencies, *inter alia*, to conduct thorough assessments of the environmental impacts of all major programs.

By 1969, a number of federal statutes had been enacted or interpreted to impose liability for environmental damages. Section 13 of the Rivers and Harbors Appropriation Act of 1899, 30 Stat. 1152 (codified as amended at 33 U.S.C. § 407), for example, prohibited the discharge of refuse into navigable waters without a permit. In the 1960s, the Supreme Court interpreted that prohibition broadly to impose strict liability on companies for obstruction of waterways caused by the discharge of industrial waste. *See, e.g., United States v. Republic Steel Corp.*, 362 U.S. 482, 491, 80 S.Ct. 884,

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itself hazardous, *see Concrete Sales & Services, Inc., v. Blue Bird Body Co.*, 211 F.3d 1333, 1339 (11th Cir.2000).

4 L.Ed.2d 903 (1960); *United States v. Standard Oil Co.*, 384 U.S. 224, 229-30, 86 S.Ct. 1427, 16 L.Ed.2d 492 (1966) (construing the Rivers and Harbors Appropriation Act of 1899 to prohibit discharge of oil). Other statutes enacted in the 1970s imposed liability, *inter alia*, for the improper handling, storage and disposal of hazardous wastes. *See, e.g.*, Resource Conservation and Recovery Act of 1976, Pub.L. No. 94-580, 90 Stat. 2795, codified at 42 U.S.C. §§ 6901-6987; Toxic Substances Control Act of 1976, Pub.L. No. 94-469, 90 Stat. 2003, codified as amended at 15 U.S.C. §§ 2601-2629. These statutes clearly telegraphed that environmental regulation was an area of intense federal concern, and that liability could be imposed under federal law.

The possibility of common law liability is also relevant, as the Supreme Court recognized in *Turner Elkhorn*. There, the Supreme Court, in addressing the issue of reasonable expectations, specifically referred to pre-existing state "workmen's compensation principles analogous to those enacted here." *Turner Elkhorn*, 428 U.S. at 15, 96 S.Ct. 2882. So too in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the Supreme Court noted the "Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances. . . ." At common law, Edison and other utilities could have potentially been held liable, under the well-established theories of nuisance and strict liability, for environmental damage and other harms resulting from the uranium processing on their behalf. The utilities should have anticipated that such liability could be imposed by the federal government, particularly since the federal government in a number of environmental statutes had taken pains to approvingly preserve common-law liability, an approval which was extended, for example, by the Supreme Court to common law tort liability for nuclear materials contamination. *See*

*Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984).

When discussing the contours and scope of the common law, the Supreme Court has instructed that it is appropriate for us to look to the pertinent Restatement and other secondary sources.[26] The *Restatement of Torts* has long recognized both injunctive and damages liability for nuisance. Nuisances may be public or private. A public nuisance has been defined as "an activity or a physical condition which endangers the health, safety or property of a considerable number of persons . . . ." *See Restatement (First) of Torts*, Intro. to ch. 40, at 217 (1939).[27] A private nuisance has been defined as "an interference with the use and enjoyment of land, and is a wrong only to persons who have property rights or privileges in the land." *Id.* at 219.[28] Numerous courts have recognized nuisance liability for the failure to contain a variety of hazardous substances in the period before 1969 when the uranium processing began. *See, e.g., Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238, 27 S.Ct. 618, 51 L.Ed. 1038 (1907) (Holmes, J.) (discharge of sulfurous gas); *Exley v. So. Cotton Oil Co.*, 151 F. 101, 102 (C.C.D.Ga.1907) (seepage of chemically polluted water); *Johnson v. City of Fairmont*, 188 Minn. 451, 247 N.W. 572,

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[26] *See, e.g., Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 250, 120 S.Ct. 2180, 147 L.Ed.2d 187 (2000) (looking to *Restatement (Second) of Trusts* as source for the common law of trusts); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538, 542, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999) (looking to *Restatement (Second) of Torts* and *Restatement (Second) of Agency* for guidance in interpreting a federal statute).

[27] *See also Restatement (Second) of Torts* § 821B (1979), defining public nuisance as "an unreasonable interference with a right common to the general public."

[28] *See also Restatement (Second) of Torts* § 821D (1979), defining private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land."

573 (1933) (discharge into stream from sewer and factory); *City of Clanton v. Johnson*, 245 Ala. 470, 17 So.2d 669, 671 (Ala.1944) (defective sewer leaking waste); *Carson v. Hercules Powder Co.*, 240 Ark. 887, 402 S.W.2d 640, 641 (1966) (discharge of industrial waste); *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 157 N.W.2d 394, 399 (1968) (discharge of air pollution by anhydrous ammonia facility).[29]

The utilities could not have had reasonable expectations of escaping liability by claiming that they were mere bystanders to the processing by the United States. Section 427B of the *Restatement (Second) of Torts*, published in 1965, made clear that those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing:

> One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve . . . the creation of a public or private nuisance, is subject to liability for harm resulting to others from such . . . nuisance.

*Id.* at § 427B. *See, e.g., Loe v. Lenhardt*, 227 Or. 242, 362 P.2d 312, 318 (1961) (spraying of chemicals by independent

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[29] Professor Keeton makes clear, for example, that damage to the environment can constitute a public nuisance:

> Another general type of "public nuisance" is one that is regarded as such because of its impact on the environment, and therefore the use and enjoyment of private property, now and in the future. . . . The air pollution, the soil pollution, the noise pollution or the water pollution must affect the plaintiff in a substantial way and for that reason constitute a private nuisance. It is not irrelevant that others are affected and that so many others are affected as to constitute a public nuisance. This would mean that the conduct is unreasonable and enjoinable.

W. Page Keeton, *et al.*, *The Law of Torts* 651 (5th ed.1984).

contractor).[30] So too, the utilities could reasonably have anticipated potential strict liability because of the hazardous nature of nuclear fuel. Indeed, at the time that the processing began in 1969, section 519 of the *Restatement (First) of Torts*, published in 1938, recognized strict liability for "ultrahazardous activity," defined as activity that: "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of utmost care, and (b) is not a matter of common usage." *Id.* at § 520. By the time the *Restatement (Second) of Torts* was published in 1977, atomic energy was singled out for special attention. Comment g to section 520 of that Restatement, for example, characterized atomic energy as an abnormally dangerous activity, concluding that "[s]ome activities, such as the use of atomic energy, necessarily and inevitably involve major risks of harm to others, no matter how or where they are carried on."[31] For all these reasons we conclude that Edison and the other utilities could not have reasonably expected that Congress would not enact legislation imposing remediation costs on the utilities submitting uranium for processing.

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[30] *See also, e.g.*, 7 Stuart M. Speiser, *et al.*, *The American Law of Torts* § 20.16, at 124 (1990) ("[A]s a general rule—all persons who do participate either in the creation or maintenance of a nuisance are liable for injuries suffered therefrom by others."); 58 Am.Jur.2d *Nuisances* § 132, at 772 (1989) ("[A]n employer cannot escape liability by employing an independent contractor to do the work, where a nuisance will result from the performance of such work in the ordinary manner.... Furthermore, it is immaterial in determining liability for nuisance that the employer refrains from directing the . . . contractor in the execution of the work procured to be done.").

[31] *See also Restatement (Second) of Torts* § 520 cmt. h, at 39 (1977) ("There is probably no activity, unless it is perhaps the use of atomic energy, from which all risks of harm could not be eliminated by the taking of all conceivable precautions, and the exercise of the utmost care, particularly as to the place where it is carried on.").

The parties have paid little attention to the reasonable expectations of utilities that did not submit uranium for processing but instead purchased enriched uranium from other utilities and then used it in their own reactors. With respect to this material, Congress confronted a choice between assessing the beneficiaries of the processing (that is, the ultimate users of the SWUs) or those utilities that submitted the uranium for processing and then sold it. We conclude that the utilities could have reasonably expected that Congress might impose the assessment on those most directly benefited-that is, the ultimate SWU users.

Despite the existence of these liability risks, Edison appears to argue that the utilities that submitted uranium for processing had no reasonable expectation that liability would be imposed. (On appeal, Edison does not separately address the expectations of the purchasers of already-processed uranium.)

First, it urges that, even if the contracts did not bar the imposition of liability, they led Edison to believe that it would escape liability. In other words, Edison claims that it was lulled into believing that no liability would be imposed. This seems to us little more than an effort to reargue the very contention rejected in *Yankee Atomic*—namely, that the special assessments essentially constituted impermissible retroactive price increases to the utility's fixed-price contracts with the government. As we held there, the contracts said nothing about freedom from possible regulation or its monetary consequences. *Yankee Atomic*, 112 F.3d at 1579. Edison and the other utilities are presumed to have been aware that under well-established principles going back more than a century these contracts could not deprive the United States of the authority to regulate in the area, and could not impose contract liability for such regulation absent an unmistakable promise, which we have held did not exist. *See Winstar*, 518 U.S. at 874, 116 S.Ct. 2432; *Jefferson Branch*

*Bank v. Skelly*, 66 U.S. (1 Black) 436, 446, 17 L.Ed. 173 (1861) ("[N]either the right of taxation, nor any other power of sovereignty, will be held . . . to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken."). Edison cannot properly rely on the contracts as shielding it from liability. Indeed, we specifically held in *Atlas* that the mere existence of a fixed price in a government contract cannot create expectations that the government will not use its sovereign power to impose additional costs. *Atlas*, 895 F.2d at 754.

Second, Edison also contends that it was led to believe by government officials that the contract price included remediation costs. Significantly, Edison does not allege that those officials represented that regulatory legislation would not be enacted.[32] Even if such promises or representations had been made about subsequent regulatory assessments, those authorities had no authority to bind the government.

Third, Edison complains that the contamination resulted from the government's failure to dispose of the uranium processing byproducts in a manner that would have avoided remediation costs. No such allegation appears in the complaint, and, even if it had, there is no allegation that Edison and the other utilities were reasonably unaware of the government's waste-disposal methods when it submitted the uranium for processing.

Fourth, Edison argues that it could not anticipate liability because title to the (unenriched) uranium passed from the utilities to the government during the time that the uranium

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[32] In its amended complaint, Edison alleges in pertinent part that "the Government expressly represented to its customers, and to Congress, that its prices [for the processing services] not only included provisions for [decontamination and decommissioning] expense, but that [decontamination and decommissioning] costs would also be recovered from future sales." Complaint at ¶ 34.

was processed at the government-owned plants and back to the utilities only after processing was complete. Edison's argument is essentially that, by temporarily giving up ownership and control of the uranium during processing, those arranging for the processing and receiving uranium after processing should not be liable. We see no basis for the utilities to assume that the technicality of temporary title transfer would necessarily excuse liability that would otherwise exist for those that submitted unenriched uranium for processing and then received enriched uranium after the processing.[33]

Fifth, Edison argues that it could not anticipate liability because the facilities were already largely (if not completely) contaminated when the uranium was processed, and because no significant additional cleanup costs were attributable to the pollution caused by utilities' uranium processing.

Both under the common law and CERCLA, shared liability was well known when multiple parties caused a single injury. *Restatement (First) of Torts* § 879 cmt. a, at 446 (1939); *Restatement (Second) of Torts* § 879 cmt. a, at 324 (1979). So too "[m]ost courts have held [that] CERCLA imposes strict liability and joint and several liability." *Aceto*, 872 F.2d at 1377-78 (collecting cases).

However, Edison argues that both under CERCLA and the common law, in a suit between the responsible parties, liability would be allocated between those responsible parties according to their relative contributions to the cleanup costs,

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[33] *See Northeastern Pharm.*, 810 F.2d at 743 (holding that ownership of a hazardous substance is not required for liability under CERCLA to attach); *Hercules*, 247 F.3d at 720-21 (holding that where "the ownership issue [is] debatable," CERCLA liability may exist because courts have " 'not hesitated to look beyond defendants' characterizations to determine whether a transaction in fact involves an arrangement for the disposal of a hazardous substance.'" (quoting *Aceto*, 872 F.2d at 1381)).

relying on cases and other authority such as *United States v. Hercules, Inc.*, 247 F.3d 706, 715 (8th Cir.2001), *Kerr-McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 326 (7th Cir.1994), and *Restatement (Second) of Torts* § 433A (1965). Edison effectively argues that it could reasonably have anticipated that it would have had the opportunity to show that the government was 100% responsible.

We do not agree. Under CERCLA and the common law it was notoriously difficult, both as a matter of law and fact, to separate contributions made by particular causes of harm. *See, e.g., Hercules*, 247 F.3d at 717 (observing that under CERCLA "proving divisibility is a very difficult proposition"); *Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 348 (6th Cir.1998) ("Given the nature of hazardous waste disposal, rarely if ever will a [potentially responsible party] be able to demonstrate divisibility of harm, and therefore joint and several liability is the norm [under CERCLA].") [34]; *Restatement (Second) of Torts* § 433A cmt. i ("Certain kinds of harm, by their very nature, are normally incapable of any logical, reasonable or practical division."). Under these circumstances the utilities should reasonably have expected that Congress might conclude that Edison and the other utilities did in fact make a major contribution to the cleanup costs and that they should share responsibility. The statute here does not impose all liability on the utilities. They are required to pay less than approximately one-third of the

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[34] *See also Kalamazoo River Study Group v. Menasha Corp.*, 228 F.3d 648, 658 (6th Cir.2000) (holding that the district court erroneously required the plaintiff to show that each defendant's discharge of hazardous waste was causally linked to an incurrence of response costs and that the correct standard does not include a specific causation requirement, but only that a plaintiff prove that a release of hazardous substances has occurred; that the release caused the plaintiff to incur "necessary costs of response"; and that each defendant is a potentially responsible party).

cost, with the remainder being borne by the government. And even this liability may be passed on to the customers of the utilities to the extent that the utilities' rates are established by traditional rate-making.

In any event, Edison misses the larger point in arguing that CERCLA or the common law would not be construed to impose liability in similar circumstances. The reasonable expectations test does not require that the law existing at the time of processing would impose liability, or that liability would be imposed only with minor changes in then-existing law. The critical question is whether extension of existing law could be foreseen as reasonably possible. Given the broad scope of CERCLA and the common law, we have no doubt that such an extension was easily foreseen, not necessarily as a certainty, but as a reasonable possibility.

In light of Edison's receipt of benefits, the proportionate nature of its liability, and its reasonable expectations, we conclude that its amended complaint failed to state a Due Process claim for which relief may be granted. We also conclude that EPACT is otherwise constitutional.[35]

## CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims dismissing the complaint for failure to state a claim is affirmed. The appeal from the denial of the stay is dismissed as moot.

*AFFIRMED.*

## COSTS

No costs.

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[35] This case does not raise an equal protection challenge to EPACT. Such a claim was made and is rejected in *Maine Yankee Atomic Power Co. v. United States*, No. 99-5156, 2001 WL 1472668 (Fed.Cir. Nov.20, 2001), which we decide today.

MAYER, *Chief Judge*, with whom *Circuit Judges* NEWMAN and RADER join, dissenting.

For the reasons set forth in Judge Friedman's opinion in *Maine Yankee Atomic Power v. United States*, Nos. 99-5156, -5158, -5160, also issued today, I would reverse the judgment of the Court of Federal Claims to the extent it rejected the due process challenge to the assessment. I also believe the assessment is an illegal exaction. Therefore, I would overrule *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed.Cir.1997), in accordance with my dissent in that case. 112 F.3d at 1582-85.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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Nos. 99-5156, 99-5158 and 99-5160.

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MAINE YANKEE ATOMIC POWER COMPANY,
*Plaintiff-Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*,

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SACRAMENTO MUNICIPAL UTILITY DISTRICT,
*Plaintiff-Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*,

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OMAHA PUBLIC POWER DISTRICT,
*Plaintiff-Appellant*,

v.

UNITED STATES,
*Defendant-Appellee*.

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Nov. 20, 2001

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Before MAYER, *Chief Judge*, FRIEDMAN, *Senior Circuit Judge*, and GAJARSA, *Circuit Judge*.

PER CURIAM.

In the Energy Policy Act of 1992, Congress imposed liability upon nuclear electric power companies that had purchased enriched uranium from the United States—the

purchases having been made as far back as 1969—for a substantial portion of the government's costs of decontaminating the plants in which it had enriched the uranium. The three appellants—electric utilities that had purchased enriched uranium from the government for their nuclear power plants and who were subject to, and had paid part of, the statutory liability—sued the United States in the Court of Federal Claims, challenging the assessments as a taking of their property for which they sought just compensation and as an unconstitutional retroactive statutory application that denied them due process and equal protection. On the government's motion, the Court of Federal Claims dismissed the complaints, holding that they did not set forth valid constitutional claims.

In *Commonwealth Edison Co. v. United States*, No. 00-5069, also decided today, this court en banc has upheld the constitutionality of that statutory assessment against similar challenges, namely that it takes the property of another utility and denies that utility due process. That decision binds this panel, and requires us to reject the utilities' taking and due process arguments in the instant case.

Two of the utilities in this case, Maine Yankee Atomic Power Company and Sacramento Municipal Utility District, also argue that the statute denies them equal protection—a contention not made in *Commonwealth Edison*. As the Court of Federal Claims stated, the utilities argued that "the fact that foreign utilities were exempted from the assessment impermissibly differentiates between similarly—situated entities—*i.e.*, all those that had consumed government-enriched uranium. In addition, plaintiffs contend, the Act draws an illegitimate distinction between purchasers who resold the uranium, and those who kept it for their own purposes, as well as between pre 1992 consumers (who are subject to the fee) and post 1992 consumers (who are exempt)." *Maine Yankee Atomic Power Co. v. United States*, 44 Fed.Cl. 372, 383 (1999).

The Court of Federal Claims correctly rejected those contentions. We rely upon and accept that court's reasoning:

> With regard to Congress's decision to exempt foreign utilities from liability, we refer to the Supreme Court's observation in *Barclay & Co. v. Edwards*, 267 U.S. 442, 451, 45 S.Ct. 348, 69 L.Ed. 703 (1924) that "[c]onsiderations of policy toward foreign countries may very well justify an exemption of the foreign corporations from taxes that might legitimately be imposed on them, but which Congress does not think it wise to exact." In addition, we think it significant that, as defendant points out in its motion to dismiss, the exclusion of foreign utilities from the liability equation in no way increases or otherwise affects plaintiffs' portion of domestic utility usage.
>
> Similarly, legislatures need not burden the most responsible party to survive rational basis review. *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998). While the original purchasers of uranium (those who resold it and were therefore exempt from assessment) may seem, to plaintiffs, equally to have benefited from the enrichment services, we cannot conclude that Congress's decision to target end-users was without rational basis. And although plaintiffs may have preferred a system under which USEC's post 1992 customers likewise picked up the tab, Congress's assignment of liability for a past problem to past consumers does not stretch the limits of the reasonable.

*Id.*

The judgments of the Court of Federal Claims dismissing the complaints are

*AFFIRMED.*

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Concurring opinion of FRIEDMAN, *Senior Circuit Judge*, in which MAYER, *Chief Judge*, joins.

Since I agree that we are bound by *Commonwealth Edison* and also agree with the court's rejection of the equal protection contention, I join in the opinion and judgment of the court. If I were not bound by *Commonwealth Edison*, however, I would hold that the retroactive assessment denies the appellants due process. My reasons for that conclusion follow.

I

A. During World War II, the United States began enriching uranium, first for military purposes and, starting in the mid 1960s, as nuclear fuel for commercial generation of electricity, which it sold to domestic and foreign utilities. *Maine Yankee Atomic Power Co. v. United States*, 44 Fed.Cl. 372, 374 (1999). The government sold the enriched uranium under fixed price contracts, which did not authorize the government to collect any additional amounts. *Id.* The decontamination and decommissioning of these polluted facilities is expected to take 40 years and to cost up to $20 billion. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1572 (Fed.Cir.1997).

Congress dealt with this problem in the Energy Policy Act of 1992 ("the Act" or "the Energy Act"). *See generally id.* That was comprehensive legislation designed to implement a "national energy policy," a reaction, at least in part, to the adverse economic effects of an oil embargo associated with the military conflict in the Persian Gulf. H.R.Rep. No. 102-474(I), at 132 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1955.

In this legislation, Congress sought to "reform the current uranium enrichment program of the [government] so that it will be operated in a more business-like fashion."

H.R.Rep. No. 102-474(I), at 142 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1965. The Act established the United States Enrichment Corporation ("Enrichment Corporation") as a government corporation to assume the operation of the government's uranium enrichment services, 42 U.S.C. § 2297, and "which eventually could be sold to the private sector." H.R.Rep. No. 102-474(I), at 142-43 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 1965-66. The Act required that the Enrichment Corporation "[w]ithin 2 years prepare a strategic plan for transferring ownership of the Corporation to private investors." 42 U.S.C. § 2297d(a). The "key purposes of the Corporation includ[ed] providing enrichment services in a business-like fashion, maximizing the economic return to the [government]." H.R.Rep. No. 102-474(I), at 198 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1953, 2021.

The Act provided that the Enrichment Corporation would not be liable for the costs of cleaning up and closing the government's uranium enrichment facilities. 42 U.S.C. § 2297c-2(d). Instead, the Act established the Uranium Enrichment Decontamination and Decommissioning Fund ("Fund") for that purpose. § 2297g. The Fund is financed through both Congressional appropriations and an assessment on those domestic utilities that purchased and used government enriched uranium. § 2297g-1(b).

The Fund is instructed to obtain up to $480 million per year (to be adjusted annually for inflation), with at most $150 million from a special assessment on the domestic utilities. § 2297g-1(a), (c). That assessment is based on each utility's share of the government's enriched uranium sales (whether purchased directly from the government or from another source), which were made prior to October 24, 1992 and that it did not resell. § 2297g 1(c). The special assessment terminates after 15 years or after $2.25 billion has been collected. § 2297g-1(e).

The Act also provided that the special assessments "shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." 42 U.S.C. § 2297g-1(g).

B. The three appellants filed separate complaints in the Court of Federal Claims, as did a number of other similarly-situated electric utilities. They contend that the special assessment constituted a breach of the fixed-price contract under which they had purchased enriched uranium from the government. The complaints included the following factual allegations, which we accept for purposes of the government's motions to dismiss. *Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States*, 48 F.3d 1166, 1169-70 (Fed.Cir.1995) ("[W]e assume that all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the movant.").

The appellants—Maine Yankee Atomic Power Company ("Maine Yankee"), Sacramento Municipal Utility District ("Sacramento District"), and Omaha Public Power District ("Omaha District") (collectively "the Utilities")—all operated nuclear power plants and purchased government-produced enriched uranium before 1992. Thus, as domestic utilities that purchased and used government provided enriched uranium, each is liable for a portion of the Act's special assessment, and each has paid millions of dollars.

The Utilities also allege that the government completely contaminated its enrichment facilities (buildings, equipment, property, and surrounding property) prior to 1969, at a time when they were used almost exclusively for defense purposes. Little, if any, additional contamination occurred after 1969, when these facilities were used to enrich uranium for sale to commercial utilities.

Maine Yankee is a domestic utility that operated a single nuclear power plant, which was permanently closed in 1996. It purchased enriched uranium from the government from 1970 to 1986 under two contracts, one executed on October 2, 1970 and the other on November 4, 1982. On its purchases of government enriched uranium, Maine Yankee is subject to a $25 million special assessment, of which it has paid more than $9.8 million.

Sacramento District is a municipal utility district in California that generates electricity and operated a nuclear generating facility, which it closed in 1989. During the operation of that facility, the Sacramento District purchased enriched uranium from the government, beginning in 1969 and ending in 1981. In 1990, the Sacramento District terminated its contract for purchasing enriched uranium. Because of those purchases, Sacramento District has paid $5.8 million in special assessments and expects its total liability to reach $8 million.

Omaha District is a domestic utility that generates and supplies electricity in Nebraska. It purchased enriched uranium from the government between 1969 and 1992 under two contracts. Omaha District has paid special assessments of more than $7.4 million, and estimates its total liability to be nearly $20 million.

One of the other utilities that filed such a suit in the Court of Federal Claims was Yankee Atomic Electric Company. That court granted Yankee Atomic summary judgment, holding that "the assessment imposed upon Yankee Atomic to fund clean-up costs constitutes an unlawful exaction because it violates the Government's earlier contractual agreements to supply enriched uranium at fixed prices." *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1571 (Fed. Cir.1997). On the government's appeal, we reversed. *Id.* We held that the special assessment did not constitute a retroactive increase of the contract price, *id.* at 1575, but

instead "constitutes a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services," *id.* at 1577.

After our decision in *Yankee Atomic*, the Utilities amended their complaints to assert claims not addressed in *Yankee Atomic;* namely, that the assessment was a taking of their property and denied them due process in violation of the Fifth Amendment. Maine Yankee and the Sacramento District also asserted that the assessment denied them equal protection.

On the government's motion, the Court of Federal Claims granted summary judgment dismissing the complaints for failure to state a claim upon which relief could be granted. *Maine Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372 (1999); *Omaha Pub. Power Dist. v. United States*, 44 Fed. Cl. 383 (1999); *Sacramento Mun. Util. Dist.*, 44 Fed.Cl. 395 (1999).

In an opinion dealing with the three cases (but issued separately for each case), the court first held that *Yankee Atomic* was not stare decisis on the constitutional issues the Utilities raised. *Maine Yankee*, 44 Fed.Cl. at 376-77. In holding that the complaints did not state a valid takings claim, the court concluded that none of the factors in "a traditional takings analysis . . .—the economic impact of the legislation, the reasonableness of plaintiffs' investment-backed expectations and the character of the government action—support the finding of a taking of property." *Id.* at 381. The court rejected the Utilities' due process claim based on the retroactivity of the assessment. *Id.* at 379-80. The court concluded its discussion of these issues with the following statement:

> Whether we analyze the assessment under the Due Process Clause, under the Takings Clause, or under some amalgam of the two, we are, in the end, faced with a

> single, basic question: Is it inherently unfair, unjust, or irrational for Congress, when faced with costs resulting from the enrichment of uranium, to ask those parties who received the uranium to contribute to the solution? The answer, quite clearly, is no. Plaintiffs' assessments are directly proportional to their usage of uranium enrichment services the very services which created the contamination. Congress itself took responsibility for more than two thirds of the clean-up costs and assigned the rest, as a general tax, to the rate-payers in districts which had previously benefited from nuclear power. Such a scheme can hardly be construed as beyond the reach of fairness or rationality.

*Id.* at 382-83.

Finally, the court rejected the claim that the special assessment denied Maine Yankee and the Omaha District equal protection because it did not cover (1) foreign utilities or (2) utilities that purchased but resold government-enriched uranium. The court denied this claim since "legislatures need not burden the most responsible party to survive rational basis review." *Id.* at 383 (citing *Ass'n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1255-56 (D.C.Cir.1998)).

II

A. The Supreme Court has noted that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (footnotes omitted). When the retroactivity is severe, the legislation may violate the Due Process Clause. *See United States v. Carlton*, 512 U.S. 26, 32, 114

S.Ct. 2018, 129 L.Ed.2d 22 (1994) (concluding that the application of a 1987 federal tax statute to a 1986 transaction did not violate due process in part because "Congress acted promptly and established only a modest period of retroactivity."); *see also id.* at 38, 114 S.Ct. 2018 (O'Connor, J., concurring) ("A period of retroactivity longer than the year preceding the legislative session in which the law was enacted would raise, in my view, serious constitutional questions."). In exceptional circumstances not involving tax law, however, longer retroactivity has been held not to deny due process. *See Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), discussed in Part III B below.

Another pertinent principle is that economic legislation has a presumption of constitutionality, which may be overcome by demonstrating that the legislation is arbitrary or irrational. *Turner Elkhorn*, 428 U.S. at 15, 96 S.Ct. 2882 (noting that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way") (citing, for example, *Ferguson v. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028, 10 L.Ed.2d 93 (1963); *Williamson v. Lee Optical Inc.*, 348 U.S. 483, 487-88, 75 S.Ct. 461, 99 L.Ed. 563 (1955)). Thus, to prevail here, the Utilities must demonstrate that the Act is arbitrary and irrational as applied to them. They have carried that burden.

The special assessment was wholly retroactive: it covered only purchases of enriched uranium before the effective date of the Act. The retroactivity was severe. It reached back to the Utilities' enriched uranium purchases that occurred up to twenty-two years (or twenty-three years, in the case of Omaha District) before the Act was passed, six years after Maine Yankee had stopped purchasing government enriched uranium, and three years after Sacramento District closed its

plant. It also was substantial, subjecting the Utilities to additional charges which they assert would total $25 million, $8 million and almost $20 million for the three companies.

The Utilities did not cause or contribute to the contamination of the government's plants, which the special assessment was designed to cure, and did not benefit from it. The Utilities allege that the contamination occurred prior to the beginning of their purchases, when the plants were producing enriched uranium "almost exclusively" for the military, and that "[l]ittle, if any additional contamination" occurred thereafter. Moreover, when the Utilities entered into the purchase contracts at a fixed price, they had no reason to believe, or even suspect, that years later the government would seek to make them pay for a substantial portion of its cleanup costs. They may well have understood and expected that the government would incur substantial expenses in making that cleanup, but they reasonably would have believed that the charges the government made for the enriched uranium included the cleanup cost. They certainly had no basis to expect that they would be subject to the additional large amounts of the assessments.

To be sure, the Utilities benefited from their participation in the government's uranium enrichment program, but the plant contamination and the cost of cleaning it up arose from an earlier stage of that program (when the Utilities were not participants). For the reasons just given, however, the Utilities' participation is not a sufficient basis under the Due Process Clause to subject the Utilities to such a substantial portion of the costs of cleaning up the contamination, which they did not cause and from which they did not benefit.

B. The government contends that *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 24, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976), supports the retroactive assessment against the Utilities. *Turner Elkhorn* involved a provision of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792, as

amended by the Black Lung Benefits Act of 1972, 86 Stat. 150, 30 U.S.C. § 901 *et seq.*, that required mining companies to pay death or total disability benefits to employee miners suffering from pneumoconiosis (black lung disease), as applied to miners who had stopped so working before the effective date of the Act. The disease, whose symptoms may "become apparent only after a miner has left the coal mines," *id.* at 8, 96 S.Ct. 2882, "is caused by long-term inhalation of coal dust," *id.* at 6, 96 S.Ct. 2882. The mining companies challenged this retroactive application of the Act as violating due process.

The Supreme Court upheld the Act against this challenge. The Court recognized that the legislation imposed new liability for disabilities developed prior to enactment, but concluded that such retroactivity was "justified as a rational measure to spread the costs of the employees' disabilities to those who have profited from the fruits of their labor." *Id.* at 18, 96 S.Ct. 2882. It reflected the "interlocking economic rights and duties of employers and employees," and "adjust[ed] the burdens and benefits of economic life." *Id.* at 15, 96 S.Ct. 2882. Thus, *Turner Elkhorn* held that it was not a due process violation for legislation "to satisfy a specific need created by the dangerous conditions under which the former employee labored—to allocate to the mine operator an actual, measurable cost of his business." *Id.* at 19, 96 S.Ct. 2882.

The Court, however, in sustaining the presumptions of the Coal Act relating to total disability, which were also at issue in the case, stated: "To the extent that the presumption of death due to pneumoconiosis is viewed as requiring compensation for damages resulting from death unrelated to the operator's conduct, its application to employees who terminated their employment before the Act was passed would present difficulties not encountered in our prior discussion of retroactivity. The justification we found for the retrospective application of the Act is that it serves to spread

costs in a rational manner—by allocating to the operator an actual cost of his business, the avoidance of which might be thought to have enlarged the operator's profits. The damage resulting from a miner's death that is due to causes other than the operator's conduct can hardly be termed a 'cost' of the operator's business." *Id.* at 24, 96 S.Ct. 2882; *see also Concrete Pipe and Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 641, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993); *United States v. Carlton*, 512 U.S. 26, 31, 114 S.Ct. 2018, 129 L.Ed.2d 22 (1994). Thus, in *Turner Elkhorn*, the Supreme Court recognized culpability as an important factor supporting the imposition of retroactive liability.

There is a critical difference between *Turner Elkhorn* and the present case that precludes the application of *Turner Elkhorn* here. In *Turner Elkhorn* the miners' illness was caused by conditions that existed when they were working for the company, for which it was responsible and which "profited from the fruits of their labor." The company, therefore, could fairly be charged with responsibility for its former employees' condition.

In the present case, however, the contamination occurred before the government sold enriched uranium to the Utilities, which neither were responsible for nor benefited from the contamination. In these circumstances, as shown, it would be unfair and unreasonable to subject the Utilities to a substantial additional charge to cure the contamination they neither caused nor benefited from.

In many (if not most) of the cases in which the Supreme Court rejected Due Process challenges to retroactive legislation, the statute dealt with the relationships, financial and otherwise, among private parties; the government's role was only the regulation of those relationships. In the present case, however, the statute deals with the relationship between the government and private parties; it seeks to transfer to those parties a substantial portion of the government's costs of

rectifying the contamination of its plants used to produce the product it sold to those parties. It is by no means clear that those Supreme Court cases may be automatically and uncritically applied to the significantly different situation here involved.

C. The government contends that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("Environmental Response Act"), 42 U.S.C. § 9601 *et seq.* (1994), supports the validity under the Due Process Clause of the retroactive assessment of clean-up costs on the Utilities. Among other things, that Act provides for the clean-up of inactive hazardous waste disposal sites and established a Hazardous Substances Response Trust Fund ("Superfund") to pay for it. The Superfund was funded initially, and in large part, by special taxes on certain petroleum products and chemicals and was to be replenished by assessments on persons responsible for the waste. Hazardous Substance Response Revenue Act of 1980, Title II, Subtitle A §§ 4611, 4661, Title II, Subtitle B, § 221, 26 U.S.C. §§ 4611, 4661, 42 U.S.C. § 9631. The government used the Superfund to fund the clean-up and replenished the cost by charging the persons responsible for the hazardous waste. 42 U.S.C. §§ 9604(a)(1), 9607. Such responsible persons include those involved in the cleanup work, including "the owner and operator of . . . a facility," anyone who at the time of disposal "owned or operated any facility at which such hazardous substances were disposed of," anyone who arranged for or participated in the "transport for disposal or treatment, of hazardous substances" and anyone who "accepted any hazardous substances for transport to disposal treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance." 42 U.S.C. § 9607(a).

The Environmental Response Act thus retroactively imposes liability on numerous persons for cleanup of pre-enactment contamination.

The government cites two Court of Appeals cases that upheld the retroactive application of the Environmental Response Act against Due Process challenges to its constitutionality, as support for the constitutionality of the retroactive assessment against the Utilities. *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726 (8th Cir.1986), held liable for cleanup costs individuals who arranged for the transportation and dumping of hazardous waste before the effective date of the Act. In *United States v. Monsanto Co.*, 858 F.2d 160, 174 (4th Cir.1988), the court ruled that retroactive application of the Environmental Response Act did not violate due process as applied to (1) landowners who leased their property to a company that stored hazardous waste on the land and (2) the companies that generated the waste but which contracted with another waste-handling business, which provided transportation, recycling and disposal of chemical waste. Noting that the companies that generated the waste profited from inexpensive waste disposal methods that may have been technically legal prior to the [Environmental Response Act]'s enactment, it was certainly foreseeable at the time that improper disposal could cause enormous damage to the environment. [The Environmental Response Act] operates remedially to spread the costs of responding to improper waste disposal among all parties that played a role in creating the hazardous conditions. . . . [T]he retroactive application of [the Environmental Response Act] does not violate due process. *Id.* at 174 (citations omitted).

In the present case, however, the Utilities did not participate in any way, directly or indirectly, or play any role in, the creation of the hazardous conditions at the government's uranium facilities. The Utilities merely purchased enriched uranium after the contamination had occurred, long

before the passage of the Energy Act. The Utilities' tangential connection with the contamination of the government's uranium enrichment facilities is quite different from the relationships to the hazardous waste disposal of the persons held constitutionally liable under the Environmental Response Act.

D. The government also contends that because 42 U.S.C. § 2297g-1(g) provides that the assessments "shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost," the Utilities will be able to pass the assessments on to their customers, and that the assessments, therefore, will not have any substantial economic impact on them.

It is impossible to predict, however, to what extent (if any) state and local regulatory agencies and courts would permit the Utilities to treat the assessments as a "current cost of fuel" in determining their rates. The question whether § 2297g-1(g) preempts state regulatory authority in this area appears difficult. The power of Congress to require that particular items be included in the Utilities' costs for rate making purposes is uncertain. Regulation of retail electric power rates is a traditional function of state government. The likelihood of the state action that the government envisions is far too speculative and conjectural to constitute a valid basis for upholding the assessments.

In any event, the question whether, and to what extent, the state regulatory agencies and courts will recognize the assessment as part of the Utilities' costs for rate making purposes appears more appropriately an issue for the damages phase of these cases than for the liability phase.

E. In sum, I conclude that the Utilities' complaints have stated a valid claim under the Due Process Clause, and that the Court of Federal Claims erred in dismissing the complaints for failure to state a claim upon which relief could be granted.

## APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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99-1464

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, AND WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

*Plaintiffs-Appellees,*

v.

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

*Defendants-Appellants.*

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DECIDED: May 3, 2001
Senior Judge Whitman Knapp

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Before RADER, *Circuit Judge*, PLAGER, *Senior Circuit Judge*,* and GAJARSA, *Circuit Judge*.

RADER, *Circuit Judge*.

Consolidated Edison Company of New York and twenty-one other nuclear utilities (collectively, Con Ed) sued the United States, the Department of Energy, and the Energy Research and Development Administration in the United States District Court for the Southern District of New York seeking declaratory judgments and injunctive relief. *Consol. Edison Co. of N.Y. v. United States*, 45 F. Supp. 2d 331 (S.D.N.Y. 1999). Con Ed's suit challenged the constitutionality of the Energy Policy Act of 1992 (EPACT), 42 U.S.C. § 2297g (1994), on due process and takings grounds. The district court denied the Government's motion to transfer the case to the United States Court of Federal Claims, or alternatively, to dismiss.

On December 5, 2000, this court affirmed the district court's decision to deny the Government's motion. The Government filed a suggestion that this court rehear that December 5 decision *en banc*. This court unanimously accepted the petition. Accordingly, this court, acting *en banc*, vacated the judgment of this court entered on December 5, 2000, and reported at 234 F.3d 642 (Fed. Cir. 2000). The *en banc* court then reassigned the opinion to the panel for revision. Because the Court of Federal Claims can offer an adequate remedy in this case, this court now reverses and remands.

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* Senior Plager assumed senior status on November 30, 2000.

I.

Con Ed sued the Government, challenging the constitutionality of EPACT. Before EPACT, Con Ed contracted with the Government for uranium enrichment services under a series of fixed-price agreements. After enactment of EPACT in 1992, the Government began decontaminating and decommissioning several of its uranium processing facilities. EPACT stipulated that the Government would pay sixty-eight percent of the decontamination and decommissioning costs; annual assessments on domestic nuclear utilities would supply the remaining thirty-two percent. EPACT made the Department of Energy responsible for computing each utility's share of the assessment in proportion to that utility's use of Government enrichment services in the past. 42 U.S.C. § 2297g-1(c) (1994) (amended 1998).

After making initial payments under EPACT, Con Ed, and other nuclear utilities not parties to this suit, sued the Government in the Court of Federal Claims seeking refunds of those payments. The lawsuits before the Court of Federal Claims asserted many of the same constitutional grounds as this lawsuit. In one such case, this court reversed the Court of Federal Claims' grant of summary judgment in favor of a nuclear utility, concluding that collection of the assessments under EPACT did not violate the utility's contract under which it had purchased the enriched uranium from the government, nor constituted a taking of the utility's contract rights. *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998).

After several subsequent nuclear utility losses in the Court of Federal Claims, Con Ed filed this suit in the district court. Instead of seeking refunds of assessments, however, Con Ed sought a declaratory judgment that EPACT was unconstitutional on several grounds and an injunction on enforcement of the EPACT assessments. By taking this procedural posture, Con Ed sought a hearing in another forum. To achieve this

objective, Con Ed drew its complaint to avoid prayers for relief actionable in the Court of Federal Claims, such as claims against the United States for money damages. *See* 5 U.S.C. § 702 (1994).

The Government moved the district court to transfer this case to the Court of Federal Claims, where other nuclear utility cases await disposition. The Government contended that Con Ed's suit in the district court under the Administrative Procedure Act (APA) amounts to impermissible forum shopping. The APA, according to the Government, does not waive sovereign immunity from this suit in the district court because Con Ed can obtain full legal relief, if successful, in the Court of Federal Claims. Specifically, the Government noted that the Court of Federal Claims has, on occasion, asserted power under the Tucker Act to order a full refund of illegally exacted funds. *See* 28 U.S.C. § 1491(a)(1) (1994); *New York Life Ins. Co. v. United States*, 118 F.3d 1553 (Fed. Cir. 1997). Thus, if Con Ed can show illegal exaction of EPACT assessments, the Government maintained, the Court of Federal Claims may have authority to order a refund. Lawsuits seeking that remedy were already pending in the Court of Federal Claims.

The Government discounted potential restrictions on the Court of Federal Claims' power to order injunctive or other prospective relief. If the EPACT assessments in fact violate constitutional guarantees, the Government asserted, injunctive relief would not be necessary. Rather, *res judicata* would bar the Government from future assessments against Con Ed under EPACT in the face of a Court of Federal Claims illegal exaction judgment. In addition, the Government assured that it would not attempt to make future assessments after a loss in the Court of Federal Claims.

In the face of these arguments, the district court denied the Government's motion. The district court cited cases from the United States Court of Appeals for the Second Circuit and the United States Supreme Court to confirm that the APA waives

the sovereign immunity of the United States for suits that properly invoke equitable relief from agency action. *Bowen v. Massachusetts*, 487 U.S. 879, 904 (1988); *In re Chateaugay Corp.*, 53 F.3d 478, 493 (2d Cir. 1995). After denying the Government's motion, the district court certified the jurisdictional question for interlocutory review. This court has exclusive jurisdiction to hear the appeal under 28 U.S.C. § 1292(d)(4)(A) (1994).

II.

The sole question in this case is whether the APA waives sovereign immunity for an action in a district court on the merits of Con Ed's claim because Con Ed seeks declaratory and prospective injunctive relief, rather than a refund of EPACT payments. This court reviews legal questions, such as jurisdiction and authority of the Court of Federal Claims and the district court, without deference. *Terran v. Sec'y of Health & Human Servs.*, 195 F.3d 1302, 1309 (Fed. Cir. 1999).

To invoke the jurisdiction of a federal court for relief from monetary obligations imposed by a federal agency, a litigant must show that the United States has waived its sovereign immunity. *Kanemoto v. Reno*, 41 F.3d 641, 644 (Fed. Cir. 1994) (citing *United States v. Sherwood*, 312 U.S. 584, 586-87 (1941) ("The terms of [the sovereign's] consent to be sued in any court define that court's jurisdiction to entertain the suit.")). The Supreme Court has explained that a litigant may invoke the APA as a waiver of sovereign immunity, thereby invoking district court jurisdiction, if the litigant can satisfy both 5 U.S.C. § 702 (by requesting "relief other than money damages") and 5 U.S.C. § 704 (1994) (no "adequate remedy" is available elsewhere, such as the Court of Federal Claims). *Bowen*, 487 U.S. at 892-93, 904-05. Although Con Ed may satisfy § 702 by not seeking "money damages," jurisdiction still lies in the Court of Federal Claims because that court can provide an "adequate remedy" in this case within the meaning of § 704.

Under specified circumstances, the APA waives sovereign immunity for actions challenging agency actions in district court. Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States *seeking relief other than money damages* and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.... Nothing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U.S.C. § 702 (emphasis added). Thus, the APA "eliminat[es] the defense of sovereign immunity in cases covered by [§ 702]." *Bowen*, 487 U.S. at 892.

Section 702, however, denies this sovereign immunity waiver to claims for money damages or for claims that seek remedies "expressly or impliedly" precluded by other statutes. 5 U.S.C. § 702; *Transohio Sav. Bank v. Dir., Office of Thrift* Supervision, 967 F.2d 598, 607 (D.C. Cir. 1992). In *Bowen*, the Supreme Court examined this limitation on APA waivers. In that case, the Commonwealth of Massachusetts sought review of a final order of the Secretary of Health and Human Services refusing to reimburse a category of Medicaid expenses. *Bowen*, 487 U.S. at 882. The Supreme Court set forth reasons that § 702's exclusion for money damages claims did not foreclose district court judicial review of Massachusetts' monetary claims. As explained below, however, this court need not address the § 702 limitation in this case because another limitation on APA review precludes district court review.

In addition to § 702's "money damages" limitation, § 704 of the APA further excludes from the APA's sovereign immunity waiver those claims for which adequate remedies are elsewhere available. 5 U.S.C. § 704; *Transohio*, 967 F.2d at 608. Section 704 states, in relevant part: "Agency action made reviewable by statute and final agency action for which there is *no other adequate remedy* in a court are subject to judicial review." 5 U.S.C. § 704 (emphasis added). In other words, a claimant with an alternative adequate remedy in another court, such as the Court of Federal Claims, cannot seek review of agency action in a district court under the APA.

Therefore, Con Ed must show that § 704 does not withdraw any waiver of sovereign immunity otherwise granted by § 702. Section 704 codifies a requirement ensuring that the general grant of review in the APA does not "duplicate existing procedures for review of agency action." *Bowen*, 487 U.S. at 903. In effect, § 704 withdraws the limited waiver of immunity under § 702 if an adequate judicial remedy is already available elsewhere. 5 U.S.C. § 704; *see also Kanemoto*, 41 F.3d at 644 ("[W]here agency action is otherwise reviewable in court and an adequate remedy is available in connection with that review, the APA's waiver of sovereign immunity under section 702 is not available."); *Mitchell v. United States*, 930 F.2d 893, 895-96 (Fed. Cir. 1991).

As noted earlier, the district court relied on the Supreme Court's *Bowen* decision for the proposition that the Court of Federal Claims could not offer an adequate remedy in this case. *Consolidated Edison*, 45 F. Supp. 2d at 336 (stating that APA has waived sovereign immunity "[b]ecause the relief sought here is disproportionately prospective and therefore equitable (as opposed to compensatory)."). *Bowen*, however, does not enunciate a broad rule that the Court of Federal Claims cannot supply an adequate remedy in any case seeking injunctive relief.

At the outset, this court notes that the Supreme Court's ruling in *Bowen* emphasized the complexity of the continuous relationship between the federal and state governments administering the Medicaid program. The Supreme Court was "not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties." *Bowen*, 487 U.S. at 905. The Supreme Court's choice of absolute language such as "categorically" and "always" leaves room for the proposition that the Court of Federal Claims may well supply an adequate remedy in cases without a complex ongoing federal-state interface. *See, e.g., Kanemoto*, 41 F.3d at 645. Unlike the Medicaid program with its shifting populations and demographics, advancing medical technologies, unforeseenable health threats, and varying state and federal economic conditions, the relationship between Con Ed and the United States features a known and fixed series of payments over time. For this reason, among others, *Bowen* does not enunciate the categorical rule that the district court attributed to it.

In *Bowen*, the Supreme Court gave several other reasons that the Court of Federal Claims could not supply an adequate remedy in that particular complex ongoing federal-state relationship. For instance, the Court labeled "doubtful" "the jurisdiction of the [Court of Federal Claims] to entertain the action, or perhaps even to enter a specific money judgment against the United States." *Id.* at 905; *see also Bowen* at 906 n.42. Although the Supreme Court had doubts about the Court of Federal Claims' jurisdiction over Medicaid disallowance decisions, this case presents no jurisdictional problems. The Court of Federal Claims has long possessed jurisdiction to consider constitutional claims, such as Con Ed's claims about the EPACT assessments, under the "illegal exaction" doctrine. *New York Life Ins.*, 118 F.3d at 1553; *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967); *Mallow v. United States*, 161 Ct. Cl. 446 (1963). Indeed, the factual

background and the constitutional claims at issue in the current litigation overlap with those already before the Court of Federal Claims. Thus, another reason for the Supreme Court's apprehensions in *Bowen* is not present in this case.

The Supreme Court further suggested in *Bowen* that "the nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington." 487 U.S. at 907-08. Unlike *Bowen*, which involved a dispute between the Commonwealth of Massachusetts and the United States, this case does not involve a state at all. This case relates to a contract between the utilities and the Government, and specifically, the utilities' financial obligations under EPACT. This case does not involve the complexities of government-to-government relationships. This case does not involve "[m]anaging the relationships between States and the Federal Government that occur over time and that involve constantly shifting balance sheets." *Id.* at 904 n.39. In sum, this case does not "involve state governmental activities that a district court would be in a better position to understand and evaluate" than the Court of Federal Claims. *Id.* at 907-08. In *Bowen*, the Supreme Court linked its judgment to a specific set of circumstances that are not present in this case. The Supreme Court's language and reasoning in that case do not preclude the Court of Federal Claims' illegal exaction doctrine from providing an adequate remedy in the circumstances of this case.

III.

Indeed the procedural background and facts of this case indicate that the Court of Federal Claims can supply an adequate remedy even without an explicit grant of prospective relief. Turning first to the facts of this case, Con Ed's district court complaint seeks a prospective injunction on its future payments of money under EPACT. In the event of success in its claims before the Court of Federal Claims,

Con Ed will receive a refund of all payments under EPACT because the United States illegally exacted those funds. In the face of such a judgment, the United States could not proceed to assess further EPACT payments without again illegally exacting funds. *Res judicata* principles would require immediate refund of any assessment with interest. *See Foster v. Hallco Mfg. Co., Inc.*, 947 F.2d 469, 475-76 (Fed. Cir. 1991) ("The principles of law denominated '*res judicata*' embody the public policy of putting an end to litigation."). Moreover, this court cannot imagine that the United States would continue to require the utility companies to pay unlawful exactions.

In sum, Con Ed's district court case in reality seeks only prospective monetary relief. Con Ed's case for retrospective monetary relief before the Court of Federal Claims overlaps with its claims for prospective monetary relief before the district court. Relief from its retrospective obligations will also relieve it from the same obligations prospectively. In this case, without the complexities of the ongoing federal-state relationships present in *Bowen*, a money judgment in the Court of Federal Claims will provide Con Ed with an adequate remedy against the same exactions in the future. *See, e.g., Kanemoto*, 41 F.3d at 645 ("[A] 'naked money judgment' would provide Kanemoto an adequate remedy.").

The procedural background of this case seals the conclusion that Con Ed has an adequate remedy in the Court of Federal Claims. Con Ed originally sued in the Court of Federal Claims seeking a refund of payments made under EPACT, asserting many of the same constitutional claims it asserts before the district court. After initial successes, the utility companies' cases took a turn against its position. *Yankee Atomic*, 112 F.3d at 1571. Only at that late stage of the litigation did Con Ed file this suit in district court deleting all reference to monetary recovery and instead seeking a declaratory judgment and an injunction.

This court and its sister circuits will not tolerate a litigant's attempt to artfully recast its complaint to circumvent the jurisdiction of the Court of Federal Claims. *Veda, Inc. v. United States Dep't of Air Force*, 111 F.3d 37, 39 (6th Cir. 1997) (citing *A.E. Finley & Assoc., Inc. v. United States*, 898 F.2d 1165, 1167 (6th Cir. 1990) ("[O]ne cannot circumvent exclusive jurisdiction in the Claims Court by suing simply for declaratory or injunctive relief in a case where such relief would be the equivalent of a judgment for money damages.")); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1099 (9th Cir. 1990); *Eagle-Picher Indus., Inc. v. United States*, 901 F.2d 1530, 1532 (10th Cir. 1990) (quoting *Rogers v. Ink*, 766 F.2d 430, 434 (10th Cir. 1985) ("A party may not circumvent the Claims Court's exclusive jurisdiction by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief where the thrust of the suit is to obtain money from the United States.")); *see also Am. Sci. & Eng'g, Inc. v. Califano*, 571 F.2d 58, 61-63 (1st Cir. 1978); *Ala. Rural Fire Ins. Co. v. Naylor*, 530 F.2d 1221, 1225-26 (5th Cir. 1976). The circuits have consistently rebuffed such blatant forum shopping to avoid adequate remedies in an alternative forum. *Id.*

Every legal issue that Con Ed seeks to resolve in this district court case could be (and, in some cases, has been) decided in a suit before the Court of Federal Claims. Likewise, as evidenced by the previously filed Court of Federal Claims litigations, a refund of the EPACT payments could provide an adequate remedy for Con Ed and other utilities. Moreover, a decision by the Court of Federal Claims would effectively moot any prospective relief that the district court could afford. Accordingly, the Court of Federal Claims can supply an "adequate remedy" to prevent the constitutional wrongs alleged by Con Ed. Therefore, under § 704, an adequate remedy in the Court of Federal Claims deprives Con Ed of duplicative district court adjudication.

## CONCLUSION

Because § 704's exception for alternative adequate remedies forecloses a waiver of immunity under § 702 in this case, the district court erred in denying the Government's motion to transfer to the Court of Federal Claims. This court returns this case to the district court with directions to transfer.

## COSTS

Each party shall bear its own costs.

*REVERSED AND REMANDED.*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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99-1464

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, AND WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas and Electric Company),

*Plaintiffs-Appellees*,

v.

UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, and ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

*Defendants-Appellants*.

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PLAGER, *Senior Circuit Judge*,** concurring.

This case confronts the court with a choice between a seemingly illogical Supreme Court rule, calling for a less-than-sensible result, on the one hand, or under-ruling the Supreme Court decision, here *Bowen v. Massachusetts*, 487 U.S. 879 (1988), on the other. This time the court has chosen the latter course. I cannot disagree; it remains to be seen whether the Supreme Court will.

** Judge Plager assumed senior status on November 30, 2000.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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99-1464

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC., NEW YORK POWER AUTHORITY, NIAGARA MOHAWK POWER CORPORATION, ROCHESTER GAS AND ELECTRIC CORPORATION, ARIZONA PUBLIC SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ENTERGY GULF STATES, INC., FLORIDA POWER CORPORATION, FLORIDA POWER AND LIGHT COMPANY, GPU NUCLEAR, INC. (on behalf of Jersey Central Power & Light Company, Metropolitan Edison Company, and Pennsylvania Electric Company), INDIANA MICHIGAN POWER COMPANY, NEBRASKA PUBLIC POWER DISTRICT, PECO ENERGY COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, SOUTHERN NUCLEAR OPERATING COMPANY, INC., SYSTEM FUELS, INC., TEXAS UTILITIES ELECTRIC COMPANY, VIRGINIA ELECTRIC & POWER COMPANY, WASHINGTON PUBLIC POWER SUPPLY SYSTEM, WISCONSIN PUBLIC SERVICE CORPORATION, AND WOLF CREEK NUCLEAR OPERATING CORPORATION (on behalf of Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., and Kansas Gas And Electric Company),

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UNITED STATES, DEPARTMENT OF ENERGY, DEPARTMENT OF ENERGY AS SUCCESSOR TO THE UNITED STATES ATOMIC ENERGY COMMISSION, AND ENERGY RESEARCH AND DEVELOPMENT ADMINISTRATION,

*Defendants-Appellants.*

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ORDER

The Appellants filed a combined petition for rehearing and rehearing en banc. A response thereto invited by the court, and filed by the Appellees. The petition for rehearing and response were referred to the panel that heard the appeal, and thereafter, the petition for rehearing en banc and response were referred to the circuit judges who are in regular active service. A poll having been taken, it is

ORDERED that the petition for rehearing en banc was granted; the judgment of the court entered on December 5, 2000, and reported at 234 F.3d 642 (Fed. Cir. 2000), is hereby vacated; and the opinion of the court accompanying the judgment is withdrawn. The en banc court returned this appeal to the merits panel, who issue the revised opinion that accompanies this order.

FOR THE COURT,

May 3, 2001
Date

s/ Jan Horbaly
JAN HORBALY
Clerk

cc: Daniel R. Murdock, Esq.
Mark W. Pennak, Esq.
Melvin C. Garbow, Esq.

**APPENDIX D**

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed: February 3, 2000]

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No. 97-269C

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COMMONWEALTH EDISON COMPANY,
*Plaintiff,*

v.

THE UNITED STATES,
*Defendant.*

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Energy Policy Act of 1992
Takings Clause; Illegal Exactions;
Yankee Atomic; Eastern Enterprises

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OPINION

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ALLEGRA, *Judge*:

This case is before the court on plaintiff's motion to stay the proceedings and defendant's motion to dismiss under RCFC 12(b)(4). Plaintiff's complaint alleges that a special assessment imposed by the Energy Policy Act of 1992, 42 U.S.C. § 2297g *et seq.*, is unlawful as either effectuating a taking or an illegal exaction. After careful consideration of the briefs filed by the parties, the oral argument, and for the reasons discussed below, the court DENIES plaintiff's motion to stay these proceedings and GRANTS defendant's motion to dismiss.

I. Facts

Plaintiff, Commonwealth Edison Company, is a domestic utility company located in Chicago, Illinois, engaged in the sale and distribution of electrical power generated from nuclear reactors. Plaintiff's nuclear reactors utilize a form of uranium enriched with the U-235 isotope. Starting in 1969, plaintiff began purchasing uranium enrichment services from the government under a series of multi-year contracts. These services were initially provided by the Atomic Energy Commission (AEC), later by the Energy Research and Development Administration in 1974 and, ultimately, by the Department of Energy (DOE) in 1977.

Under the uranium enrichment contracts, plaintiff delivered low-grade uranium to the government to be enriched. The enrichment services were measured in terms of "separative work units" (SWUs). Plaintiff paid for the services by multiplying the number of SWUs provided by the unit price established by the terms of the governing contract. Although the terms of the contracts varied over the years, all the contracts contained essentially identical pricing provisions that based the charge for the government's services upon a contractually defined "established pricing policy," i.e., the price in effect at the time the service was performed. Further, many of the contracts included a "ceiling charge" that limited the maximum unit charge for enrichment services. In 1984, the government developed a standard requirements-type contract for uranium enrichment services referred to as a Utility Services Contract. In July 1984, plaintiff entered into a Utility Services Contract after terminating all of its existing uranium enrichment contracts with the government through a Supplemental Agreement of Settlement ("Settlement Agreement"). Similar to the prior contracts, the Utility Services Contract charged plaintiff for the enrichment services according to "the established DOE pricing policy" and included a ceiling charge.

In the late 1980s, Congress recognized that the government's uranium enrichment facilities would have to be decontaminated and decommissioned. The DOE estimated that the total cost of this clean-up could exceed $20 billion over 40 years. To address this problem, Congress passed the Energy Policy Act of 1992, 42 U.S.C. §§ 2297g *et seq.* (1994), creating a Uranium Enrichment Decontamination and Decommissioning Fund that would accumulate the funds required to clean-up the uranium enrichment facilities. The Act provides that monies deposited into the Fund would derive from two sources: (i) up to $150 million per fiscal year (to be annually adjusted for inflation using the Consumer Price Index) would be collected as a special assessment from domestic utility companies which purchased and used the enrichment services; and (ii) the balance, up to $330 million annually (adjusted again for inflation), would be provided from public funds appropriated by Congress. *See* § 2297g-1(b)-(d). Further, the Act states that the collection of monies would cease after the earlier of 15 years after October 24, 1992, or the collection of $2.25 billion (adjusted again for inflation) from the domestic utility companies. *See* § 2297g-1(e).

The Act provides that the special assessment imposed on each domestic utility is based on the percentage of SWUs purchased from the DOE relative to the total number of SWUs produced by the DOE. *See* § 2297g-1(c). Under the Act, a domestic utility is considered to have purchased a SWU if the SWU was originally produced by DOE, even if the utility purchased it from another source; conversely, a utility is not considered to have purchased a SWU if it resold the SWU to another utility. *Id.* Thus, the Act imposes the assessment only on those domestic utilities that ultimately benefited from the DOE's enrichment services.[1] Domestic

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[1] Two groups of purchasers of enrichment services are exempt from the special assessment: (i) domestic customers who purchased USEC

utilities that are subject to the special assessment are permitted, under the Act, to treat the assessment as "a necessary and reasonable current cost of fuel" which "shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost." *See* § 2297g-l(g).

Since passage of the Act in October 1992, DOE has annually billed plaintiff for its *pro-rata* share of the special assessment. Plaintiff claims that it has paid in excess of $95.5 million to the Fund. In June of 1995, this court addressed a domestic utility's challenge to the Energy Policy Act's special assessment in *Yankee Atomic Elec. Co. v. United States*, 33 Fed. Cl. 580 (1995). In its decision, this court determined that the special assessment was an illegal exaction under the Takings Clause of the Fifth Amendment because it retroactively increased the price utilities paid for uranium enrichment services in breach of the contracts between the utilities and the government. *Id.* at 584-85. Plaintiff, like many other domestic utilities subject to the special assessment, filed suit in this court on April 1, 1997, challenging the legality of the special assessment imposed by the Energy Policy Act. Plaintiff's complaint alleged that the special assessment breached plaintiff's contracts with defendant by retroactively increasing the cost of the uranium enrichment services and constituted a taking in violation of the Takings Clause of the Fifth Amendment.

On May 6, 1997, while plaintiff's case was pending before this court, the Federal Circuit reversed the Court of Federal Claim's decision in *Yankee Atomic*, finding that the fee assessed under the Energy Policy Act constituted "a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties

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services any time after 1992; and (ii) foreign utilities, who represented 25% of DOE's pre-1992 customer base. *See Omaha Public Power District v. United States*, 44 Fed. Cl. 383, 386 (1999).

for uranium enrichment services." *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, 1577 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 2365 (1998). Thus, the Federal Circuit concluded that the special assessment did not breach any contact rights and "[b]ecause the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment." *Id.* at 1580 n.8. After the Federal Circuit issued its decision in *Yankee Atomic*, plaintiff, along with numerous other domestic utility companies, filed suit on June 12, 1998, in the United States District Court for the Southern District of New York, seeking both a declaratory judgment that the Energy Policy Act is unconstitutional and injunctive relief from future assessments under the Act. On November 2, 1998, plaintiff filed a motion to stay the proceedings in the instant case pending resolution of the case before the Southern District of New York ("the district court action").[2]

Plaintiff then filed an amended complaint in the instant case on February 2, 1999. In its amended complaint, plaintiff distanced itself from the contract-based claims that were rejected by the Federal Circuit in *Yankee Atomic* by alleging that the special assessment constitutes: (i) an unlawful taking of money in violation of the Takings Clause of the Fifth Amendment; (ii) an illegal exaction in violation of the Due Process Clause of the Fifth Amendment; and (iii) an unlawful taking of its contract rights distinguishable from the issues litigated in *Yankee Atomic*. On February 10, 1999, defendant filed a motion to dismiss the amended complaint for failure to state a claim upon which relief can be granted. Oral argument on the motion to dismiss was held on November 2, 1999.

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[2] On November 25, 1998, the district court denied defendant's motion to stay the district court action pending resolution of the case before this court. *See Consolidated Edison Co. v. United States*, 30 F. Supp. 2d 385 (S.D.N.Y. 1998).

II. Motion for Stay

The court turns first to plaintiff's motion to stay this case. "The power of a federal trial court to stay its proceedings . . . is beyond question." *Cherokee Nation of Oklahoma v. United States*, 124 F.3d 1413, 1416 (Fed. Cir. 1997) (citing *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936)). "When and how to stay proceedings is within the sound discretion of the trial court." *Id.*

The Federal Circuit has identified a tripartite formula for trial courts to employ when deciding whether to stay a case: (i) "a trial court must first identify a pressing need for the stay;" (ii) "[t]he court must then balance interests favoring a stay against interests frustrated by the action;" and (iii) "[o]verarching this balancing is the court's paramount obligation to exercise jurisdiction timely in cases properly before it." *Cherokee Nation*, 124 F.3d at 1416. In addition, where a related case is pending before another court, as is true here, a trial court should also consider: (i) principles of comity, with the normal rules favoring the court in which a case is first filed, *Northrop Corp. v. United States*, 27 Fed. Cl. 795, 801 (1993); (ii) judicial economy, focusing, *inter alia*, on whether a stay is necessary to avoid duplicative litigation, *Haustechnik v. United States*, 34 Fed. Cl. 740, 745 (1996); and (iii) the motives of the party seeking the stay, with courts disfavoring stays where the movant is seeking to avoid adverse precedent, *Adrienne Village v. United States*, 25 Cl. Ct. 457, 459-61 (1992).

Applying these factors to the instant case, this court concludes that the plaintiff's motion to stay these proceedings should be denied for several reasons. First, as discussed below, it appears that, contrary to plaintiff's claims, this court has the jurisdiction to rule on each of the counts in the amended complaint and thus need not defer to the district court's broader jurisdiction. As such, the balancing as to whether to stay this case tips decidedly in favor of this court

timely exercising jurisdiction in a case properly before it. Second, in denying the stay, this court is influenced by the simple fact that this case was filed before the district court action, suggesting that, under the principles of comity identified above, resolution of this case ought to take precedence.[3] *See also Northwest Airlines, Inc. v. American Airlines, Inc.*, 989 F.2d 1002, 1005 (8th Cir. 1993)(citing *United States Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488-89 (8th Cir. 1990)); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu*, 675 F.2d 1169, 1174 (11th Cir. 1982). Finally, this court is troubled by plaintiff's motive in seeking this stay, which, despite its protests to the contrary, is plainly underlain by the hope that, while this court yields, the district court will proceed and, in rendering its decision, not follow the Federal Circuit's decision in *Yankee Atomic*. While plaintiff certainly is within its rights in joining the district court action, this court need not countenance such legal gamesmanship, the evident purpose of which is to circumvent what would otherwise be binding precedent. *See Garber v. Sir Speedy, Inc.*, 930 F. Supp. 267, 271 (N.D. Tex. 1995) ("Litigants should be discouraged from filing suits in courts with concurrent jurisdiction for the purpose of avoiding adverse rulings in the court in which the action was originally filed."), *aff'd*, 91 F.3d 137 (5th Cir. 1996).

In sum, this court believes that it is solemnly obliged to exercise the jurisdiction that the plaintiff itself properly

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[3] The district court's failure to stay its proceedings in the related case may well be attributable to representations made to that court indicating that this court lacked jurisdiction to resolve all the issues presented by the plaintiff's complaint. *See* Plaintiff Utilities' Memorandum of Law in Opposition to the Government's Motion to Stay (March 10, 1999) at 14-16. As further discussed in detail below, these representations were, in this court's view, erroneous.

invoked prior to joining the action in the district court. Accordingly, this court concludes that plaintiff's motion for stay should be denied.[4]

III. Motion to Dismiss

When a federal court reviews the sufficiency of the complaint pursuant to a motion to dismiss, "its task is necessarily a limited one." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* Toward this end, "the allegations of the complaint should be construed favorably to the pleader." *Id. See also Henke v. United States*, 60 F.3d 795, 797 (Fed. Cir. 1995); *Hamlet v. United States*, 873 F.2d 1414, 1416 (Fed. Cir. 1989). In rendering a decision, the court must presume that the undisputed factual allegations included in the complaint by a plaintiff are true. *See Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 747 (Fed. Cir. 1988).

Plaintiff's amended complaint contains three counts. The first alleges that the Act's special assessment constitutes an unlawful taking of money in violation of the Fifth Amendment. The second alleges that the special assessment imposes a disproportionate and extremely retroactive

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[4] The court is aware that other judges of this court have stayed cases involving the special assessment imposed by the Energy Policy Act, choosing to allow the district court action to proceed. *See, e.g., New York Power Authority v. United States*, 42 Fed. Cl. 795 (1999). It appears that the circumstances in those cases were somewhat different, particularly in terms of the timing of the motion for stay as compared to the procedural posture of the case before this court. However, to the extent these rulings are based upon the view that this court cannot consider whether the special assessment constitutes an illegal exaction, *see id.* at 801, this court, for the reasons discussed below, respectfully disagrees.

liability—a so—called "illegal exaction"—in an arbitrary and irrational manner in violation of the Due Process Clause of the Fifth Amendment. The third and final count alleges that the imposition of the special assessments constitutes a taking of the fruits of its contractual agreements with the government. The court will consider these counts each in turn. But, since the result of this analysis potentially centers on the Federal Circuit's *Yankee Atomic* decision, which is binding precedent,[5] the court will begin by examining that decision.

A. The *Yankee Atomic* Decision.

In *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569 (Fed. Cir. 1997), the Federal Circuit reversed the Court of Federal Claims' grant of summary judgment to the utility company Yankee Atomic. This court had determined that the special assessment imposed on domestic utility companies pursuant to the Act breached Yankee Atomic's prior contracts with the government and constituted an illegal exaction under the Takings Clause of the Fifth Amendment. *See Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995). Yankee Atomic had alleged the special assessment breached its contracts with the government by retroactively increasing the price it had to pay for previously supplied uranium enrichment services. According to the Federal Circuit, the resolution of Yankee Atomic's claim hinged on whether the special assessment was more accurately characterized "as a

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[5] Under the doctrine of *stare decisis*, questions of law decided by the United States Court of Appeals for the Federal Circuit constitute binding precedent upon this Court. *See Compliance Corp. v. United States*, 22 Cl. Ct. 193, 204-OS n.9 (1990), *aff'd*, 960 F.2d 157 (Fed. Cir. 1992). *See also* 18 James Wm. Moore et al., *Moore's Federal Practice* x[134.02[3] (3rd ed. 1998). Of course, *stare decisis* applies "only to legal issues that were actually decided in a prior action" and not to issues that were neither "litigated [nor] resolved." *Beacon Oil Co. v. O Leary*, 71 F.3d 391, 395 (Fed. Cir. 1995).

retroactive price increase rather than an exercise of the sovereign's taxing power." 112 F.3d at 1573. To distinguish between these characterizations, the court relied upon two related bodies of law: the sovereign acts doctrine and the unmistakability doctrine.

The Federal Circuit noted that the Supreme Court had recently discussed the sovereign acts doctrine in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). *Yankee Atomic, 112* F.3d at 1574. Describing the plurality opinion in *Winstar*, the Federal Circuit stated that, under the sovereign acts doctrine, "[t]he Government-as-contractor cannot exercise the power of its twin, the Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties." 112 F.3d at 1575. *See also Winstar*, 518 U.S. at 891-98. At the same time, the sovereign acts doctrine recognizes that "the Government-as-sovereign must remain free to exercise its powers," lest every general enactment of Congress be viewed as the evasion of a contract. 112 F.3d at 1575.[6] The Federal Circuit indicated that determining whether the Government, in passing legislation, is acting as a contractor or a sovereign, requires "a case specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts." *Id.*

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[6] *See also Horowitz v. United States*, 267 U.S. 458, 461 (1925)("The United States when sued as a contractor cannot be held liable for an obstruction of the performance of the particular contract resulting from its public and general acts as a sovereign"); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir. 1990), *cent. denied*, 498 U.S. 811 (1990); *Tony Downs Food Co. v. United States*, 530 F.2d 367, 370 (Ct. Cl. 1976); *Coast-to-Coast Financial Corp. v. United States*, Slip Op. No. 95-525C at 10-11 (Fed. Cl. Jan. 19, 2000). *See generally*, Gerard Wimberly & Kristen Amerly, *The Sovereign Acts Doctrine After Winstar*, 6 Fed. Circuit B.J. 127 (1996).

Applying this analysis to the Energy Policy Act, the Federal Circuit concluded that that legislation was not designed to alter or affect the Government's prior contracts. In reaching this conclusion, the Federal Circuit was heavily influenced by the fact that the special assessment applies not to the utilities that had contracted for uranium enrichment services, but rather to the utilities that ultimately received the enriched uranium and thus benefited from the DOE services. Summarizing this finding, the Federal Circuit stated:

> The reach of the Act, therefore, makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements. Rather than targeting those utility companies that had prior contracts with the Government, the Act targets whichever utility eventually used and benefited from the DOE's enrichment services. Congress's main purpose was to spread the costs of a problem that it realized only after the contracts had been performed.

*Id.* at 1575-76. The court thus concluded that the assessment essentially was "a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services," noting further that "[a]ny impact that this approach may have on those utilities with which the Government had prior contracts is 'merely incidental to the accomplishment of a broader governmental objective.'" *Id.* at 1576 *(quoting Winstar*, 518 U.S. at 897). *See also O'Neill v. United States*, 231 Ct. Cl. 823, 826 (1980). The court noted, however, that this was not the end of its inquiry as it still had to determine whether the Government, in its contracts with Yankee Atomic, had unmistakably surrendered the right to exercise its sovereign taxing power.

Harkening again to the *Winstar* plurality opinion, the Federal Circuit described the "modern unmistakability doctrine" as "allowing the Government to make agreements that bind future Congresses, but only if those contracts

contain an unmistakable promise." 112 F.3d at 1578. Explaining further the limits of this doctrine, the Federal Circuit highlighted the following passage from *Winstar*:

> [A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

*Id.* at 1578 *(quoting Winstar*, 518 U.S. at 878).[7] Analyzing the contracts between Yankee Atomic and the government, the Federal Circuit first found that they did not contain an express statement that Yankee Atomic would be "immune from any future assessments made by the Government upon the industry as a whole." 112 F.3d at 1579. The court next determined that the fixed-price terms of the contract did not constitute an unmistakable promise that the government would not impose "a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services" because the "language of the contract is directed at the prices charged for providing enriched uranium to Yankee Atomic, and not to any decontamination or decommissioning costs which may subsequently arise." *Id.* at 1580. Based upon these observations, the Federal Circuit concluded that the contracts "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." *Id.*

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[7] *See also Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 (1982); Jean O. Melicious & Robert J. Thornton, Contractual Ecosystem Management Under the Endangered Species Act: Can Federal Agencies Make Enforceable Commitments?, 26 Ecology L.Q. 489, 505-12 (1999).

The Federal Circuit determined that the absence of an unmistakable promise in the subject contracts resolved both Yankee Atomic's contract and takings arguments. In rejecting the breach of contract claim, the Federal Circuit observed that the Government had complied fully with the provisions of the contracts and that the subsequent special assessments were not "a deliberate retroactive increase in the price of those contracts," but rather "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service." *Id.* at 1580. In rejecting the takings argument, the court explained:

> Because the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment. At most, Yankee Atomic has a vested right to be immune from later attempts to retroactively increase the prices charged. This right has not been taken because, as explained in the sovereign acts discussion, the assessment is a general, sovereign act rather than a retroactive price increase.

*Id.* at 1580 n.8. The Federal Circuit thus sustained the application of the special assessment to Yankee Atomic.

Accordingly, *Yankee Atomic* concluded that the special assessment did not constitute a modification of the prior contracts, but rather an exercise of the sovereign taxing power. It further concluded that the exercise of that power was not unmistakably precluded by the contracts in question and that the imposition did not effectuate a taking of a vested contract right. With these lessons firmly in mind, the court now turns to an analysis of the individual counts in the plaintiff's amended complaint.

B. The Individual Counts

1. Count I: Can There Be a Taking of Money?

Count I of plaintiff's amended complaint alleges that the Energy Policy Act's special assessment constitutes an unlawful taking of money in violation of the Fifth Amendment. This claim was not addressed by the *Yankee Atomic* court, which focused only on whether there had been an unconstitutional taking of the plaintiff's vested contracts. The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." In light of this language, determining whether this first count states a claim hinges on whether "money" can be deemed "property" for purposes of the Takings Clause.

In arguing that the financial burden imposed by the special assessment constitutes a taking, plaintiff relies heavily on the Supreme Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 118 S. Ct. 2131 (1998). In *Eastern*, a plurality of the Supreme Court held that a provision of the Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), which required coal operators to fund the retirement health benefits of current and former employees, effected an unconstitutional taking of money, as applied to the petitioner Eastern Enterprises, because it placed a "severe, disproportionate, and extremely retroactive burden on Eastern" in violation of the Takings Clause. 524 U.S. at 538. In so concluding, the plurality applied a regulatory taking analysis, focusing on "'[t]he economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action.'" *Id.* at 523-24 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)). *See also Penn Central Transp. Co. v. New York*, 438 U.S. 104, 124 (1978).

As to the first of these factors, economic impact, the plurality held "there is no doubt that the Coal Act has forced a considerable financial burden upon Eastern." 524 U.S. at 529. Regarding the second factor, the plurality found that the retroactivity of the Coal Act, which reached back to impose liability on activities occurring 30 to 50 years earlier, "interferes with Eastern's reasonable investment-backed expectations." *Id.* at 532. Regarding this point, the plurality further observed that "the Coal Act operates retroactively, divesting Eastern of property long after the company believed its liabilities . . . . to have been settled." *Id.* at 534. Finally, evaluating the third regulatory taking factor, the nature of the governmental action, the plurality found that funding retired coal miners' health benefits is the type of complex problem that typically calls for a legislative solution. *Id.* at 537. The plurality, nonetheless, found that solution objectionable, concluding that "[w]hen . . . that solution singles out certain employers to bear a burden that is substantial in amount, based on the employers' conduct far in the past, and unrelated to any commitment that the employers made or to any injury they caused, the governmental action implicates fundamental principles of fairness underlying the Takings Clause." *Id.* As such, "in the specific circumstances of this case," the plurality adjudged, "we conclude that the Coal Act's application to Eastern effects an unconstitutional taking." *Id.*

In his concurring opinion, Justice Kennedy agreed the Coal Act was unconstitutional, but under the Due Process Clause and not under the plurality's Takings Clause analysis. His principal point of departure from the plurality's takings analysis was their failure to identify the specific property right or interest at stake. Mapping the contours of this disagreement, Justice Kennedy explained:

> Our cases do not support the plurality's conclusion that the Coal Act takes property. The Coal Act imposes a staggering financial burden on the petitioner, Eastern

> Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land *(e.g.*, a lien on a particular piece of property), a valuable interest in an intangible *(e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so. To the extent it affects property interests, it does so in a manner similar to many laws; but until today, none were thought to constitute takings. To call this sort of governmental action a taking as a matter of constitutional interpretation is both imprecise and, with all due respect, unwise.

524 U.S. at 540. Burnishing his views further, Justice Kennedy opined: "True, the burden imposed by the Coal Act may be just as great if the Government had appropriated one of Eastern's plants, but the mechanism by which the Government injures Eastern is so unlike the act of taking specific property that it is incongruous to call the Coal Act a taking, even as that concept has been expanded by the regulatory takings principle." *Id.* at 542.

While disagreeing with Justice Kennedy's conclusion that the Coal Act was unconstitutional, the four dissenting judges agreed "that the plurality views this case through the wrong legal lens," asserting that "[t]he Constitution's Takings Clause does not apply." 524 U.S. at 554. Justice Breyer, speaking on behalf of the four dissenters, stated: "[t]he 'private property' upon which the Clause traditionally has focused is a specific interest in physical or intellectual property . . . . This case involves, not an interest in physical or intellectual property, but an ordinary liability to pay

money . . . ." *Id.* Observing that "application of the Takings Clause here bristles with conceptual difficulties," Justice Breyer noted that the plurality's analysis seemingly would apply to ordinary taxes and other statutes and rules that routinely create financial burdens for some that benefit others. *Id.* at 556. In his view, questions involving the potential unfairness of imposing such monetary obligations find "a natural home" not in the Taking Clause, but in the Due Process Clause, "a Fifth Amendment neighbor." *Id.* The dissent ultimately concluded that the Coal Act did not violate the Due Process Clause, finding that it was neither fundamentally unfair nor unjust. *Id.* at 558-68.

Plaintiff urges this court to apply the plurality's takings analysis, but discerning a controlling rule of law from the welter of conflicting opinions in *Eastern* requires careful reflection. Regarding the precedential impact of such split decisions, the Supreme Court has instructed that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)). However, the *Marks* rule is applicable only where "one opinion can be meaningfully regarded as 'narrower' than another" and can "represent a common denominator of the Court's reasoning." *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994) (quoting *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992)). Thus, in cases where approaches fundamentally differ, no particular standard is binding on an inferior court because none has received the support of a majority of the Supreme Court. *Id.* at 1058. *See also Texas v. Brown*, 460 U.S. 730, 737 (1983) (stating that a plurality view that does not command a majority is not binding precedent); *Hertz v. Woodman*, 218 U.S. 205, 213-14

(1910) ("[T]he principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in [the Supreme Court] or in inferior courts").

As applied to *Eastern*, these principles mean that no part of the plurality's reasoning constitutes binding precedent. The plurality opinion and Justice Kennedy's concurrence agree in result and focus on similar facts, but share no common denominator in terms of legal rationale.[8] As such, the only part of the plurality opinion that is binding is the specific result—the Coal Act is unconstitutional as applied to Eastern. Citing *Marks*, numerous courts have recently agreed with this conclusion, observing that *Eastern* essentially leaves takings law unaffected. *See Holland v. Big River Minerals* Corp., 181 F.3d 597, 606 (4th Cir. 1999), *cert. denied*, 2000 WL

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[8] In an earlier decision involving the Energy Policy Act, this court distilled the plurality and concurring opinions into the following "clear principle," to wit, "a liability that is severely retroactive, disruptive of settled expectations and wholly divorced from a party's experience may not constitutionally be imposed." *Omaha Public Power District*, 44 Fed. Cl. 383, 390 (1999). *See also Maine Yankee Atomic Power Co. v. United States*, 44 Fed. Cl. 372, 378-79 (1999); *Sacramento Municipal Utility District v. United States*, 44 Fed. Cl. 395, 401 (1999). While the court agrees with this statement as an observation, it does not believe that *Eastern* stands for this proposition under the rules normally applied in discerning the precedential impact of split decisions. In particular, this court believes that it is important to determine whether the constitutionality of the special assessment is amenable to a Takings Clause analysis, as opposed to a Due Process analysis. While each of these approaches has similarities, they are not identical and dwell on different factors. *See United States v. DICO, Inc.*, 189 F.R.D. 536, 542 (S.D. Iowa 1999)("That Justice O'Connor's Takings Clause analysis and Justice Kennedy's Due Process Clause analysis may both have turned on 'issues of fairness,' however, does not change the fact that the two opinions were premised on distinct constitutional principles. They cannot now be combined in an attempt to establish 'a majority rule'").

29401 (2000)(noting that five justices reasoned that the takings analysis was inapplicable to the Coal Act "because no identifiable property interest was infringed by the legislation"); *Unity Real Estate Co. v. Hudson*, 178 F.3d 649, 658-59 (3d Cir. 1999), *cert. denied*, 120 S.Ct. 396 (1999); *Anker Energy Corp. v. Consolidated Coal* Co., 177 F.3d 161, 169 (3d Cir. 1999), *cert. denied*, 120 S.Ct. 496 (1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1254 n.5 (D.C. Cir. 1998) (while indicating that *Eastern Enterprises* likely worked no change in the law of takings, stating that "[t]he only conceivable change in takings jurisprudence brought about by Eastern Enterprises is that the five dissenting justices . . . apparently believe that the imposition of liability alone is not a taking of property under the Fifth Amendment"); *United States v. Alcan Aluminum Corp.*, 49 F.Supp.2d 96, 98-99 (N.D.N.Y. 1999)(same); *United States v. DICO, Inc.*, 189 F.R.D. 536, 542 (S.D. Iowa 1999)(same).[9] As such, this court must determine for itself whether money constitutes "property" within the meaning of the Takings Clause. Several reasons compel this court to agree with Justice Kennedy's concurrence in *Eastern Enterprises* and to conclude that the exercise of the taxing power, thereby creating a monetary obligation, is not subject to a takings analysis under the Fifth Amendment.

It is foundational juridical principle that a takings claim cannot succeed if a government action, through causing economic harm, "[does] not interfere with interests that [are] sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central Transp. Co.*, 438 U.S. at 125. Accordingly, before a party can recover compensation under the Fifth Amendment for a taking, under either a physical

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[9] *See also* Jack Decker Bristow, *Eastern Enterprises v. Apfel: Is the Court One Step Closer to Unraveling the Takings and Due Process Clauses?*, 77 N.C.L.Rev. 1525, 1526 (1999).

invasion or regulatory taking theory, it must establish a compensable property interest, that is, a specific interest in physical or intellectual property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (regulatory taking); *Kaiser Aetna*, 444 U.S. at 179-80 (physical invasion).[10] Accordingly, for count I of plaintiff's amended complaint to state a claim the money allegedly taken by the special assessment must constitute the type of "property" that is amenable to a takings analysis under the Fifth Amendment.

However, consistent with Justice Kennedy's concurrence in *Eastern*, as well as Justice Breyer's dissent, the courts have generally held that a government-imposed obligation to pay "money" is not susceptible to a taking analysis. These holdings take various forms. Some courts have squarely held that money is not "property" within the meaning of the Takings Clause. *See, e.g., Unity Real Estate Co.*, 178 F.3d at 674-78 (rejecting the application of a takings analysis to the tax imposed by the Coal Act); *Atlas Corp. v. United States*, 895 F.2d 745, 756 (Fed. Cir. 1990)("Requiring money to be spent is not a taking of property.").[11] Other courts, taking a

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[10] This court's decisions are to similar effect. *See Holden v. United States*, 38 Fed. Cl. 732, 735 (1997); *Flathead Joint Board of Control v. United States*, 30 Fed. Cl. 287, 293 (1993), *aff'd*, 59 F.3d 180 (Fed. Cir. 1995).

[11] Plaintiff cites *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), in support of its position that a taking of money can violate the Takings Clause. In *Webb's*, the Supreme Court held that a state statute pursuant to which a county could take the interest accruing on an interpleader fund deposited in the registry of the county court was unconstitutional in violation of the Takings Clause of the Fifth and Fourteenth Amendments. Id. at 164-65. *Webb's* is distinguishable from the instant case because in *Webb's*, a specific property interest was at stake—the actual interest accruing on a specific, separately identifiable fund held in a court's registry. *Webb's* did not involve the taking of money based on the imposition of a financial burden in the nature of a tax, like the instant case.

more transactional approach, have concluded that government-imposed obligations to pay money are not the sort of governmental actions subject to a takings analysis. *See Branch v. United States*, 69 F.3d 1571, 1576-77 (Fed. Cir. 1995), *cent. denied*, 519 U.S. 810 (1996)("[T]he principles of takings law that apply to real property do not apply in the same manner to statutes imposing monetary liability."); *Meriden Trust & Safe Deposit Co. v. FDIC*, 62 F.3d 449, 455 & n.2 (2d Cir. 1995) (per se takings analysis is inapplicable to congressional imposition of monetary liability); *Commercial Builders v. Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992)(a purely financial exaction does not constitute a taking).[12] And still other courts have touched upon this issue in holding, for example, that monetary obligations incidentally imposed on a property holder as the result of the government's physical taking of real property (*i.e.*, the cost of moving a business from condemned property) are not compensable. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 379-80 (1945). Taken together, these cases lead this court to conclude that a government-imposed payment of money cannot result in a compensable taking.[13] *See Eastern*, 524 U.S. at 554 (Breyer, J., dissenting) ("This case involves not an interest in physical or intellectual property, but an ordinary liability to pay money . . . .").

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[12] *See also Garneau v. City of Seattle*, 147 F.3d 802, 818 n.5 (9th Cir. 1998) (Williams, J., concurring) (noting that "[o]ther courts have expressed discomfort in applying takings principles to actions challenging the constitutionality of government-mandated monetary payments.").

[13] Indeed, one might argue that the plaintiff staking claim is weaker than that of someone simply complaining about a government-imposed monetary obligation, because the Energy Policy Act allows the plaintiff to pass on to its customers, through rate hikes, the burden of the special assessment. *See* 42 U.S.C. § 2297g-1(g). Arguably, then, plaintiff's own money has been unaffected by the special assessment.

Even were money considered property for purposes of the Takings Clause, this court perceives a host of practical and theoretical problems with applying that constitutional mode of analysis to a simple obligation to pay funds to the government, particularly an obligation imposed under the taxing power. For example, in describing why a takings analysis does not fit an assessment of money, the Federal Circuit, in *Branch*, stressed:

> To be sure, analyzing the assessment under the principles of takings law is awkward. If a particular government action is deemed a taking, it means that the government may engage in the action but must pay for it . . . . But because the property allegedly taken in this case was money that leads to the curious conclusion that the government may take the bank's money as long as it pays the money back.

*Branch*, 69 F.3d at 1575-76.[14] This language in *Branch* hints at a deeper problem, involving the remedy available under the Takings Clause. Thus, while ordinarily a plaintiff stating a takings claim must concede the lawfulness of the actions of the government that gave rise to the alleged "taking,"[15] here the thrust of plaintiff's claim is that the Energy Policy Act is unlawful and, effectively, should be unenforceable. Such a holding, however, cannot properly derive from the Takings Clause, which is not prohibitory, but rather compensatory, in

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[14] *See also* Johnathan Sullivan, Case Comment, *Eastern Enterprises v. Apfel: How Lochner Got it Right*, 60 Ohio St. L.J. 1103, 1125 (1999) ("The fair value of a specific sum of money is, obviously, the amount of money taken; the concept of a taking or of just compensation in this situation is simply impracticable.").

[15] *See Crocker v. United States*, 37 Fed. Cl. 191, 195-96 (1997) (citing cases), *aff'd*, 125 F.3d 1475 (Fed. Cir. 1997); *Perry v. United States*, 28 Fed. Cl. 82, 85 (1993)("A takings claim may only be based on the Government's rightful exercise of its property, contract, or regulatory powers.").

nature. As observed by the Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314-15 (1987): "[The Takings Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." (emphasis in original)(citations omitted). *See also* Johnathan Sullivan, *supra*, at 1124-25. Accordingly, under the facts of this case, the Takings Clause simply does not provide a basis for holding the special assessment authorized by the Energy Policy Act unconstitutional.[16]

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[16] The Supreme Court reached a similar conclusion in *United States v. Sperry Corp.*, 493 U.S. 52 (1989). In *Sperry Corp. v. United States*, 12 Cl. Ct. 736 (1987), plaintiff attacked the constitutionality of section 502 of the Foreign Relations Authorization Act of 1985, which allowed the United States to deduct a fee from any award made by the Iran Claims Tribunal to an American claimant. The Claims Court determined that the legislation did not violate the Takings, Due Process or Origination Clauses of the Constitution. After the Federal Circuit reversed the Claims Court's ruling and found section 502 unconstitutional in violation of the Takings Clause, *see* 853 F.2d 904 (1988), the Supreme Court reversed, finding that the assessment was constitutional. In discussing the application of the Takings Clause, the Supreme Court indicated that:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible... If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services . . . . Such a rule would be an extravagant extension of *Loretto [v. Teleprompter Manhattan CA TV* Corp, 458 U.S. 419, 441 (1982)].

493 U.S. at 62 n.9.

In sum, this tour d'horizon leads this to court believe, for a variety of reasons, that a takings analysis is inapplicable to count I. Accordingly, count I of the amended complaint must be dismissed.[17]

2. Count II—Is the Special Assessment an Illegal Exaction?

In count II of its amended complaint, plaintiff asserts that the special assessment is an "illegal exaction," alleging that it imposes a disproportionate and extremely retroactive liability in an arbitrary and irrational manner in violation of the Due Process Clause of the Fifth Amendment. A similar claim was not addressed by the *Yankee Atomic* court, which, though essentially characterizing the special assessment as a tax, did not consider whether the assessment violated the Due Process Clause of the Fifth Amendment.

Before turning to the merits of this count, the court must address an odd jurisdictional dispute, for plaintiff now argues that this court lacks jurisdiction to consider its illegal exaction claim. Plaintiff, however, has not sought to amend its complaint to drop this count, but instead argues that once the district court rules in the related cases, jurisdiction over the illegal exaction claim will spring into existence. Defendant, for its part, disputes this and argues that this court has jurisdiction now to consider this claim. This court thus is

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[17] Were this court obliged to apply a takings analysis to the special assessment, it would, nonetheless, conclude that there has been no taking here. In this regard, the court concurs with the observations expressed in the context of the regulatory takings analysis in *Omaha Public Power District*, 44 Fed.Cl. at 393-94, and its progeny. *See also Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 222-23 (1986) (requirement that employer fund vested benefits of a pension plan not a regulatory taking); *Concrete Pipe & Products of Calif, Inc. v. Construction Laborers Pension Trust for S. Calif*, 508 U.S. 602, 641-43 (1993) (rejecting regulatory taking challenge to employer withdrawal liability provisions).

obliged to determine whether it has jurisdiction over count II's illegal exaction claim.[18] *See Puerto Rico v. United States*, 44 Fed. Cl. 618, 623 (1999) ("The court always has the right—indeed the obligation—to consider its own jurisdiction")(quoting *Clark v. United States*, 229 Ct. Cl. 570, 576 (1981)(Harlan, J., concurring)).

The Court of Federal Claim's "jurisdiction is limited to such cases where the Constitution or a federal statute requires the payment of money damages as compensation for the violation." *Murray v. United States*, 817 F.2d 1580, 1582-83 (Fed. Cir. 1987), *aff'd*, 864 F.2d 148 (Fed. Cir. 1988), *cent. denied*, 489 U.S. 1055 (1989) (citing *United States v. Mitchell*, 463 U.S. 206, 218 (1983), and *United States v. Testan*, 424 U.S. 392, 401-02 (1976)). *See also Lyashenko v. United States*, 41 Fed. Cl. 626, 628 (1998). Consistent with this rule, the Federal Circuit has held that this court ordinarily does not have jurisdiction over claims based on due process violations because, "[a]lthough the Fifth Amendment's due process clause provides that no person shall be deprived of property without due process of law, no language in the clause itself requires the payment of money damages for its violation." *Murray*, 817 F.2d at 1583. *See also Medina Construction, Ltd. v. United* States, 43 Fed. Cl. 537, 558 (1999) ("This Court lacks jurisdiction over causes of action alleging violations of the Fifth Amendment principles of due process or equal protection.").

However, the courts have reached a different conclusion in so-called illegal exaction cases. Illegal exaction jurisdiction

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[18] The role reversals encountered on this jurisdictional point—with plaintiff arguing that this court lacks jurisdiction and defendant arguing that such jurisdiction lies—may be explained in light of the motion for stay filed in this case. Plaintiff argued for the stay based, in part, on its assertion, that this court could not resolve all the issues raised by its complaint. Defendant, in opposing the stay, argued that this court had jurisdiction to resolve those issues.

will lie in cases where a "plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum" that "was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation." *Eastport SS Corp. v. United States*, 372 F.2d 1002, 1007-1008 (Ct. C1. 1967). *See also United States v. Testan*, 424 U.S. 392, 400-02 (1976) (referencing Court of Claims jurisdiction over claims "for money improperly exacted or retained"); *New York Life Ins. Co. v. United States*, 118 F.3d 1553, 1556 (Fed. Cir. 1997), *cert. denied*, 118 S. Ct. 1559 (1998); *Aerolineas Argentinas v. United States*, 77 F.3d 1564 (Fed. Cir. 1996); *South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 626 (1964), *cert. denied*, 379 U.S. 964 (1965). Indeed, "[i]n illegal exaction cases, in contrast to other actions for money damages, jurisdiction exists [to recoup moneys previously paid] even when the [constitutional] provision allegedly violated does not contain compensation mandating language." *Bowman v. United States*, 35 Fed. Cl. 397, 401 (1996). *But see Lark v. United States*, 17 Cl. Ct. 567, 569-70 (1989) (rejecting existence of illegal exaction jurisdiction).[19]

Moreover, this court has asserted jurisdiction in cases involving exactions that allegedly violated provisions of the Constitution not ordinarily viewed as money—mandating. For example, in *Mallow v. United States*, 161 Ct. Cl. 446 (1963), this court's predecessor was faced with a claim by a civilian seeking to recover a fine imposed by a courts—martial that had no jurisdiction over him. In these circumstances, the Court of Claims found that the fine was

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[19] Although Judge Tidwell rejected the existence of illegal exaction jurisdiction in *Lark*, he later accepted such jurisdiction in the 1997 case of *Bernaugh v. United States*, 38 Fed. Cl. 538, 543 (1997), *aff'd*, 168 F.3d 1319 (Fed. Cir. 1998), noting that "[j]urisdiction exists in illegal exaction cases even when the provisions allegedly violated do not contain money-mandating language."

collected in violation of due process and concluded that "it seems that the plaintiff's claim for the recovery of the money that was taken from him by the Government without due process of law may be properly regarded as one 'founded * * * upon the Constitution,' for purposes of 28 U.S.C. 1491." 161 Ct. Cl. at 454 (alteration in original). More recently, in *Bowman v. United States*, 35 Fed. Cl. at 401, this Court concluded that this court could exercise illegal exaction jurisdiction to consider claims that property had been forfeited in violation of the Double Jeopardy Clause. *See also Doherty v. United States*, 500 F.2d 540, 542 (1974) (court had jurisdiction in case involving a claim that application of a forfeiture statute that violated equal protection rendered a taking). Accordingly, these decisions exemplify that this court has jurisdiction to consider whether the special assessment is an illegal exaction violative of the Due Process Clause, despite the fact that that clause does not contain compensation mandating language.

Turning to the merits, it is important to note, at the outset, that an economic statute, such as the Energy Policy Act, comes to the court with a presumption of validity. An illustrative case is *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976), in which the Supreme Court stated: "It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." The Supreme Court has recognized that the strong deference afforded economic legislation applies even when the legislation at issue is applied retroactively. "Provided that the retroactive application of a statute is supported by a legitimate legislative purpose furthered by rational means," the Court stated, "judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *Pension Benefit*

*Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984). The Court added, "retroactive legislation does have to meet a burden not faced by legislation that has only future effects . . . . But that burden is met simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 730. *Accord United States v. Carlton*, 512 U.S. 26, 30—31 (1994) ("The due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation . . . ."); United *States v. Sperry*, 493 U.S. at 64.

Plaintiff makes two arguments in favor of its claim that the special assessment is an illegal exaction. First, it asserts that the assessment is extremely retroactive, as it imposes a "tax" on government sales of uranium enrichment services that were made as many as 39 years ago. Second, it complains that the assessment is disproportionately imposed. On this latter point, it argues that there is no rational connection between the liability imposed by the special assessments and plaintiff's conduct because the government was in control of the operation of uranium enrichment facilities and those facilities were contaminated before plaintiff began purchasing those services. The court will deal with these arguments in turn.

Regarding the retroactivity of the special assessment, the court must ask the question whether it is rationally related to a legitimate legislative purpose furthered by rational means. While, at first blush, the length of time here might seem problematic, on reflection, the absolute number of years involved is far less relevant than the reasons for the retroactivity and its impact on the plaintiff.[20] In this regard, it

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[20] *See Robert Morris College v. United States*, 11 Cl. Ct. 546, 553 (1987). Indeed, in various cases, the Supreme Court and others courts have upheld retroactivity much greater in absolute terms than is encountered here. For example, in *Turner Elkhorn*, the black lung law

is important that the need for decommissioning and decontamination was not fully recognized until near the time the Energy Policy Act was enacted. *See Yankee Atomic*, 112 F.3d at 1576 ("Congress's main purpose was to spread the costs of a problem that it realized only after the contracts had been performed."). Once those costs were recognized, it surely was not inappropriate for the Congress to impose a portion of those costs on the domestic firms who benefited from the enrichment services. Calibrating the special assessment to the number of enriched units received by those utilities certainly was a fair way to quantify those benefits, even though it necessarily entailed some level of retroactivity in terms of calculating how many units had been received by a utility over time. In these circumstances, it cannot be said that the retroactivity of the Act is irrational or that that retroactivity unfairly impacted on the plaintiff. *See Turner Elkhorn*, 428 U.S. at 18 (noting that it is rational to attempt to impose the costs inherent in a certain type of business activity on "those who have profited from the fruits" of the business in question); *Sperry Corp.*, 493 U.S. at 65 ("It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the entire class of persons that Congress rationally believes should bear them.").[21]

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was enacted in 1969 and began imposing liability on employers in 1973. Yet, the court approved providing benefits to miners who left mine work as early as 1923. *See Turner Elkhorn*, 428 U.S. 1, 40 n.4 (1976)(Powell, J. concurring in part). Similarly, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§9601 *et seq.*, has an unlimited retrospective reach, but has not been invalidated by any court to consider this issue. *See, e.g., United States v. Monsanto Co.*, 858 F.2d 160, 173-74 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

[21] As the Supreme Court has observed, "whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Turner Elkhorn*, 428 U.S. at 19.

In addition, it appears that the liability imposed by the special assessment is neither disproportional nor excessive. The Energy Policy Act imposes liability only on those utilities that benefited from the government's uranium enrichment services. The legislative history of the Act indicates that, notwithstanding the government's earlier use of the facilities for defense purposes, at least two benefits were received by the utilities: (i) the utilities received the government's uranium enrichment services at below the market price; and (ii) by purchasing the government's service, the utilities avoided the cost of building and cleaning up its own plant. *See* Senate Comm. on Energy and Natural Resources, 103d Cong., 2d Sess., *Legislative History of the Energy Policy Act of 1992*, Vol. 6, at 4553-54 (Comm. Print 1994) (Statement of Rep. Philip R. Sharp). *See also Yankee Atomic*, 112 F.3d at 1575-76. Correspondingly, the liability imposed by the Act is reasonably based on each utility's pro rata consumption of the government's uranium enrichment services. Under the Energy Policy Act, the government pays more than 68% of the total decontamination and decommissioning expense, 42 U.S.C. §2297g-1(a) and (d), while the domestic utilities contribute 32%, subject to both an annual cap, 42 U.S.C. 2297g-1(c), and an aggregate cap, 42 U.S.C. §2297g-1(e). Moreover, the Act permits domestic utilities to include the special assessments in "necessary and reasonable" costs, which are fully recoverable in rates. 42 U.S.C. §2297g-1(g). Given these limitations on the special assessment, the significant contribution of the Federal government and the significant benefits received by the plaintiff in terms of uranium enrichment services, it cannot be said that the burden imposed by the special assessment is disproportionate with the plaintiff's past conduct. *See Omaha Public Power District*, 44 Fed. Cl. at 391-92.

Although the Federal Circuit did not rule on an illegal exaction argument in *Yankee Atomic*, it, nonetheless, observed that the special assessment was not unduly

retroactive or disproportionate. In this regard, it stated that "the assessment appears to be very similar to . . . a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services." *Id.* at 1576. It further noted:

> To the extent that the Energy Policy Act is designed to spread the costs of a societal problem, it is not unlike other instances where Congress has enacted legislation to spread societal costs. One such example involves the costs of cleaning up hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et. seq.* (1994). The defendants in those lawsuits have frequently challenged the retroactive application of CERCLA as a violation of their due process rights and as an unconstitutional taking. The courts, however, have rejected those arguments. *See id.* at 734 (rejecting due process challenge because "Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole"). Yankee Atomic contends that the CERCLA cases, and others like them, are inapposite because they involve the impact of legislation on private parties and therefore do not implicate the Government's self-interest. We cite the CERCLA cases not for their insight as to Congress' motives in enacting the Energy Policy Act, but rather for their general proposition that the costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem.

*Id.* at 1576 n.6 (citations omitted). Accordingly, the Federal Circuit opinion in *Yankee Atomic* supports this court's conclusion that the special assessment constitutes a

reasonable exercise of the Congress' taxing power, and, as such, does not constitute an illegal exaction.[22]

3. Count III—Was There a Taking of a Contract Right?

In count III of its amended complaint, plaintiff alleges that the imposition of the special assessments constitutes a taking of the fruits of its contractual agreements with the government. Unlike counts I and II, this issue was squarely addressed by the Federal Circuit in *Yankee Atomic*, 112 F.3d 1569. As discussed above, the Federal Circuit held that the special assessments did not constitute a retroactive price increase that abrogated a vested contract right, but instead constituted a sovereign act designed to spread the costs associated with the decontamination and decommissioning over all domestic utilities that used the government's uranium

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[22] In *Eastern Enterprises*, Justice Kennedy found that the Coal Act was overly retroactive in violation of the Due Process Clause because Eastern left the coal business before the industry bargaining agreements included a commitment to the funding of lifetime health benefits for retirees. *Eastern*, 524 U.S. at 549. Eastern could not have contemplated liability for such benefits, and thus there was no correlation between Eastern's conduct and its liability under the Act. In other words, imposing liability on an entity which played no role in promising such benefits was irrational and arbitrary. Justice Kennedy distinguished other Supreme Court cases such as *Turner Elkhorn* and *Gray*, which upheld legislation imposing liability on former employers based on past employment relationships, by stating that such statutes "were remedial, designed to impose an 'actual, measurable cost of [the employer's] business' which the employer had been able to avoid in the past." *Id.* at 549-50 (citations omitted)(alteration in original). In the instant case, the special assessment under the Energy Policy Act is also remedial and seeks to impose the costs of "a societal problem"—the clean up of uranium enrichment facilities—on those utilities which benefited from the use of uranium enrichment services provided by those facilities. Imposition of a portion of the liability for clean up on the utilities which benefited from the contaminated facilities is a rational means of addressing the problem.

enrichment services. *Id.* at 1580-81. Plaintiff, however, claims that its contracts are significantly different from those at issue in *Yankee Atomic* and that they set the maximum amount of liability it could incur related to uranium enrichment services.[23]

Specifically, plaintiff claims that its 1984 Utility Services Contract with the government differs from contract at issue in *Yankee Atomic*. The pricing provision of this contract provided, in pertinent part, that:

> The charges to be paid to DOE for enrichment services provided to the Customer hereunder will be determined in accordance with the established DOE pricing policy for such services, provided that the unit charge for enrichment services under this contract shall not exceed a ceiling charge of $135.00 per separative work unit through September 30, 1985. After that date, the ceiling charge is subject to adjustment to reflect changes in DOE's costs, including changes in electrical rates and the purchasing power of the U.S. Dollar.

*See* Contract No. DE-SC05-84UE07511, July 5, 1984 Utility Services Contract, Article IV (Attached at Tab 1 of Complaint filed April 9, 1997). Contrary to plaintiff's claim, however, this pricing provision does not differ significantly from the pricing provision in Yankee Atomic's contracts, which similarly incorporated DOE's pricing policy and established a ceiling charge. *See Yankee Atomic*, 112 F.2d at 1572, 1579.

Plaintiff also notes that it entered into a Supplemental Agreement of Settlement with the government under which all liability was extinguished for purchases of enrichment

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[23] This court does not have to go outside the pleadings to determine whether the provisions of plaintiff's contracts are materially different from the contracts at issue in *Yankee Atomic* because plaintiff's contracts are attached to its original complaint, filed April 9, 1997.

services made under its pre-1984 contracts. Plaintiff claims that this settlement agreement was not at issue in *Yankee Atomic*. The settlement agreement terminated plaintiff's existing contracts, concluded defendant's obligations arising under the existing contracts, and allowed plaintiff to enter the 1984 Utility Service Contract. The preamble to this agreement indicated that "the Customer and the Government desire to terminate the contracts at no cost to either party in order to enter into a new Utility Services form of uranium enrichment service contract covering the enrichment needs of the facilities designated in said contracts." The actual agreement which followed contained only two paragraphs, to wit:

> 1. The contracts identified above are hereby terminated in their entirety.
>
> 2. The Customer hereby unconditionally waives any claim against the Government by reason of the termination of the contracts and releases it from any and all obligations arising under the contracts by reason of their termination; and the Government agrees that all obligations arising under the contracts or by reason of their termination shall be deemed to be concluded.

*See* Supplemental Agreement of Settlement, July 5, 1984 (Attached at Tab 2 of Complaint filed April 9, 1997). As can be seen, neither of these clauses addressed or precluded the future assessment of clean-up costs, let alone doing so in the required unmistakable terms. *See Omaha Public Power District*, 44 Fed. Cl. at 388-89 (holding that a similar settlement agreement did riot satisfy the unmistakability requirement). Moreover, as the Federal Circuit emphasized in *Yankee Atomic*, the special assessment in the Energy Policy Act did not constitute a modification of the prior contracts, but rather represented simply an exercise of the government's taxing power. *See Yankee Atomic*, 112 F.3d at 1575-77.

Accordingly, the analysis in *Yankee Atomic* is fully applicable to plaintiff's 1984 Utility Services Contract and Supplemental Agreement of Settlement. Neither contract "expressly states that [plaintiff] will be immune from any future assessments made by the Government upon the industry as a whole." *Yankee Atomic*, 112 F.3d at 1579. Further, neither the fixed price terms of plaintiff's Utility Services Contract nor the termination language in the settlement agreement "constitute[s] an unmistakable promise on behalf of the Government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services." *Id.* at 1580. Accordingly, count III of plaintiff's amended complaint must be dismissed under the doctrine of *stare decisis*, as resolved by the Federal Circuit's decision in *Yankee Atomic*.[24]

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[24] Plaintiff further claims that defendant made oral statements which constituted an unmistakable promise that plaintiff would be immune from the general assessment. This claim lacks validity. The unmistakability doctrine is a special rule of contract interpretation that focuses on the express words of the applicable contract. *See Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 967 F.2d 598, 618-19 (D.C. Cir. 1992). Oral statements or other statements not contained in the contract are irrelevant to the issue whether the contract contains an unmistakable promise exempting the contracting party from a subsequent sovereign act of the government. *See Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986) ("[W]e have declined in the context of commercial contracts to find that a sovereign forever waives the right to exercise one of its sovereign powers unless it expressly reserves the right to exercise that power in the contract") (citation omitted). *See also Transohio Savings Bank*, 967 F.2d at 618 ("[O]ne who wishes to obtain a contractual right against the sovereign that is immune from the effect of future changes in law must make sure that the contract confers such a right in unmistakable terms.")(quoting *Western Fuels-Utah, Inc. v. Lujan*, 895 F.2d 780, 789 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 811 (1990), *and cert. denied*, 498 U.S. 812 (1990)); *Statesman Sav. Holding Corp., v. United States*, 26 Cl. Ct. 904, 919 (1992) (same), *aff'd sub nom. Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996).

IV. Conclusion

For the foregoing reasons, the court DENIES plaintiff's motion to stay these proceedings, GRANTS defendant's motion to dismiss, and directs the entry of judgment accordingly.

Francis M. Allegra
Judge

## APPENDIX E

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed: February 28, 2000]

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No. 97-269C

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COMMONWEALTH EDISON COMPANY,
*Plaintiff*,

v.

THE UNITED STATES,
*Defendant*.

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Motion for Reconsideration; Energy Policy Act;
Consideration of Legislative History

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ORDER

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On February 25, 2000, plaintiff filed a Motion for Reconsideration, requesting this court to reconsider its decision of February 3, 2000, wherein this court granted defendant's motion to dismiss. In general, the memorandum in support of this motion misinterprets and mischaracterizes this court's opinion. It repeatedly targets two statements that plaintiff claims this court adopted inconsistent with the allegations in its complaint.

Plaintiff first takes issue with this court's statement that "it is important that the need for decommissioning and decontamination was not fully recognized until near the time the Energy Policy Act was enacted." *Commonwealth Edison Co. v. United States*, No. 97-269C, slip op. at 17-18 (Fed. Cl. Feb. 3, 2000). In its memorandum, plaintiff recharacterizes

(rewrites) this statement as indicating that the government was "unaware" of the need for decommissioning and decontamination until "almost 1992" or "approximately 1992." This is clearly not what this court stated, as evidenced by its use of the qualifying term "fully recognized" (rather than, as plaintiff states, "unaware") and by the statement earlier in the opinion that: "*[i]n the late 1980s*, Congress recognized that the government's uranium enrichment facilities would have to be decontaminated and decommissioned." *Id.* at 2 (emphasis added). The statements actually made by this court are fully consistent not only with the legislative history of the Energy Policy Act,[1] but also with the summary of that history contained in the Federal Circuit's opinion in *Yankee Atomic Electric Co. v. United States*, 112 F.3d 1569, 1576 (Fed. Cir. 1997), *cert. denied*, *118* S.Ct. 2365 (1998).

At all events, plaintiff overlooks the fact that the statement upon which it focuses is ancillary to the main reason why this court rejected plaintiff's due process argument. The opinion makes clear that no due process violation occurred here because it was rational for the Congress to impose a portion of the cost of decommissioning and decontamination on the companies that had benefited from the uranium enrichment services and to measure those benefits by looking retroactively to determine the number of enriched uranium units ultimately used by particular utilities. *See Commonwealth Edison*, slip op. at 18. The time that the final dollar figure for decommissioning and decontamination was finally ascertained is largely, if not entirely, irrelevant to this analysis.

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[1] *See, e.g.*, H.R. Rep. No. 102-474, at 66 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2295, referring to a "[c]urrent estimates prepared by [Department of Energy] contractors" that indicated that "the total costs of cleanup could exceed $20 billion over 40 years." *See also* the legislative history quoted in footnote 2, *infra*.

The second statement that plaintiff contests as being inconsistent with its complaint is the court's determination that the utilities benefited from the uranium enrichment services. This determination, again, was based upon legislative history—specifically, the detailed statement of Representative Philip R. Sharp, the House floor manager of the bill [2]—which, contrary to plaintiff's claim, this court appropriately considered in the context of a motion to dismiss. *See id.* at 18. Moreover, in characterizing this floor statement as isolated, plaintiff turns a blind eye to that part of the Conference Committee Report on the bill that similarly states: "[t]he prevailing view on the allocation of costs of cleaning up these plants is that it should be based on *benefits received from the program*, namely in proportion to

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[2] In this regard, Mr. Sharp stated:

> The terms of the cost recovery requirement [of section 161 v. of the Atomic Energy Act] were in fact very favorable to commercial customers. Although the Government was required to fully recover its costs, it could not charge a price higher than costs. Therefore, for many years when the utilities would have had to pay a higher market price to obtain these services from other sources, the Government was restrained by this provision to charge a lower price set at costs.
>
> Furthermore, by getting use of these plants in return for paying a proportional share of fixed costs, utilities were able to avoid the even greater costs of building a plant of their own and paying for all of the original plant investment and eventual clean-up costs. In this way, the overall terms of cost-recovery under 161v. were meant to balance the interests of the commercial customers and the taxpayers.
>
> However, in practice the cost recovery requirements of 161 v. have not worked very well. Because of unproductive investments and a failure to adequately account for cleanup costs, the program ended up charging prices that were not only below market, but also below costs.

Senate Comm. on Energy and Natural Resources, 103d Cong., 2d Sess., *Legislative History of the Energy Policy Act of* 1992, Vol. 6, at 4553-54 (Comm. Print 1994) (Statement of Rep. Philip R. Sharp).

purchases of enrichment services." H.R. Rep. No. 102-474, at 77 (emphasis added). Contrary to plaintiff's claim, this court is not required to ignore this legislative history in determining whether Congress acted rationally in passing the special assessment simply because plaintiff alleges to the contrary in its complaint.[3]

Based on the foregoing, as well as the court's review of the other grounds for reconsideration contained in plaintiff's motion and accompanying memorandum,

IT IS ORDERED:

The Motion for Reconsideration is DENIED.

Francis M. Allegra
Judge

[3] Contrary to plaintiff's claim, it is well-established that a court need not accept as true allegations contained in a complaint that are contradicted by matters on which the court may take judicial notice, such as legislative facts embodied in legislative history. *See* 5ACharles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure § 1363*, at 464-65 (2d ed. 1990) (citing cases). Plaintiff also is flatly wrong in arguing that judicial notice of such legislative facts is precluded by Federal Rule of Evidence 201, which instead deals only with adjudicative facts. *See, e.g., FDIC v. Jackson Shaw Partners No. 46, Ltd. et al.*, 1994 WL 665262 at *9 n.4 (N.D. Cal. 1994); *Levy v. Scranton*, 780 F. Supp. 897, 900-01 (N.D.N.Y. 1991).

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

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Nos. 96-5021, 96-5025.

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YANKEE ATOMIC ELECTRIC COMPANY,
*Plaintiff/Cross-Appellant,*

v.

THE UNITED STATES,
*Defendant-Appellant.*

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May 6, 1997

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Rehearing Denied; Suggestion for Rehearing In Banc Declined Aug. 15, 1997.*

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Before MAYER, LOURIE, and CLEVENGER, *Circuit Judges.*

CLEVENGER, *Circuit Judge.*

This case requires us to decide whether, in light of prior contracts specifying the price to be paid for uranium enrichment services, the Government may impose upon domestic utilities a special assessment to aid in funding the clean-up costs associated with the facilities that provided those enrichment services.

The United States appeals the decision of the United States Court of Federal Claims, *Yankee Atomic Electric Co. v. United States*, 33 Fed. Cl. 580 (1995), granting summary judgment to Yankee Atomic Electric Company (Yankee

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* Circuit Judge Newman would rehear the appeal in banc.

Atomic). In that decision, the court determined that the assessment imposed upon Yankee Atomic to fund clean-up costs constitutes an unlawful exaction because it violates the Government's earlier contractual agreements to supply enriched uranium at fixed prices. We conclude that the assessment was lawful and therefore reverse.

I

As both parties acknowledge, the salient facts are not in dispute. Yankee Atomic was organized in 1954 by a number of existing utility companies in an effort to participate in the use of atomic energy as an alternative-source fuel for generating electricity. Yankee Atomic produced electricity using nuclear fuels and sold the resulting electricity to the organizing utilities, which, in turn, sold it to retail customers.

Yankee Atomic's operations required an enriched form of uranium, which was produced by separating useful isotopes of uranium from other isotopes. Beginning in 1963, Yankee Atomic purchased the uranium enrichment (or separation) services from the Government through a series of contracts. Those services were provided at enrichment plants operated first by the Atomic Energy Commission (AEC or Commission) and later by the Energy Research and Development Administration and the Department of Energy (all collectively DOE). Although these contracts varied somewhat from one to another, they each stated that the price paid by Yankee Atomic for the enrichment services would be based on "established Commission pricing policy," which was defined as the price in effect at the time the service was provided. There is no dispute that the Government fulfilled its contractual obligation to provide the enrichment services, and that Yankee Atomic fulfilled its obligation to pay the price in effect at that time.

In the late 1980s, Congress determined that it had to restructure the Government's uranium enrichment services in order to remain competitive with enrichment services

provided by other parties. It did so by creating a new, for-profit, governmental corporation called the United States Enrichment Corporation. At the same time, Congress realized that there would be large costs associated with decontaminating and decommissioning the facilities that had previously been used to provide enrichment services. The Department of Energy estimated that the total cost of this clean up could exceed $20 billion over 40 years, which amounted to about $500 million per year, indexed to inflation. H.R.Rep. No. 474, pt. VIII, at 77 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2295. Because this decontamination and decommissioning fiscal problem was not recognized until the 1980s, the prices charged in the Government's past uranium enrichment contracts had not accounted for the problem.

This clean-up problem was one of many energy-related issues that Congress addressed in the Energy Policy Act of 1992 (Energy Policy Act or Act). The Act establishes an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (Fund), which, over a 15-year period, would accumulate the monies required to clean up the old uranium enrichment plants. The Act provides that the annual deposits of $480 million (adjusted for inflation), will come from two sources: (i) up to $150 million is to be collected as a special assessment from domestic utility companies; and (ii) the balance, at least $330 million, is to come from public funds appropriated by Congress.

The Act further provides that each utility is responsible for a pro-rata share of the total annual assessment based on the percentage of uranium enrichment work units it previously purchased from the DOE relative to the total number of work units previously produced by the DOE. The Act states that a utility is considered to have purchased a work unit from the DOE if the work unit was originally produced by DOE, even if the utility actually purchased it from another source. Similarly, a utility is not considered to have purchased a work

unit from the DOE if it resold that work unit to another utility.[1] In sum, the Act imposes the assessment upon whichever utility company eventually uses the enrichment services.

Following the passage of the Act in October 1992, the DOE sought to assess Yankee Atomic's share of the annual special assessment. Yankee Atomic responded by arguing to the DOE that it should be exempted from the assessment because its facilities had shut down before passage of the Act. When the DOE rejected this argument, Yankee Atomic paid approximately $3 million pursuant to three annual assessments, and filed a lawsuit in the Court of Federal Claims seeking recovery of those payments.

II

Upon cross-motions for summary judgment, the Court of Federal Claims ruled in favor of Yankee Atomic. The court rejected the Government's contention that the special assessment was a lawful exercise of Congress's taxing power under the sovereign acts doctrine. The court explained that although the sovereign acts doctrine would have some force if the case involved a general tax that fell on all utilities alike, it had no impact in the present case which involves an assessment that "reaches only those utility companies that previously had contracted with the Government for the purchase of uranium enrichment services." Accordingly, the court viewed the special assessment as a unilateral retroactive increase in the price previously charged by the Government for its uranium enrichment services.

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[1] These provisions were designed to take into account the secondary market that existed for uranium enrichment services, wherein some utilities purchased uranium enrichment work units from the Government and resold them to other utilities. Yankee Atomic purchased a portion of its uranium enrichment services through this secondary market, but does not assert any breach of contract, taking, or unlawful exaction claim concerning its monetary liability under the Act for those purchases.

The court explained that such a retroactive price increase would constitute an unlawful exaction in view of the prior contracts between the Government and Yankee Atomic. Because those prior contracts specified a fixed price for the uranium enrichment services, the "economic benefit which [Yankee Atomic] gained by virtue of the Government's promise, being a benefit enforceable at law, thus became a property interest that fell beyond the reach of the Government's power to take away." 33 Fed. Cl. at 585.

Based on this conclusion, the court granted Yankee Atomic's motion for summary judgment without addressing Yankee Atomic's argument that it was exempt from the assessment because its facilities had closed before passage of the Act. We review the Government's appeal, and Yankee Atomic's cross-appeal, from the judgment of the Court of Federal Claims pursuant to 28 U.S.C. § 1295(a)(3) (1994).

## III

The decision of the Court of Federal Claims is driven by its characterization of the special assessment as a retroactive price increase rather than an exercise of the sovereign's taxing power, and the parties' dispute over this characterization frames the dispositive issue of this appeal.

The Government's principal argument is that the special assessment is entirely distinct from the prior contracts between the DOE and utility companies such as Yankee Atomic. The Government notes that those earlier contracts concerned uranium enrichment, whereas this assessment concerns decontamination and decommissioning. As a result, the Government asserts that the assessment cannot constitute a breach of those earlier contracts unless those contracts contained an express provision that precluded the Government from imposing an assessment to fund decontamination and decommissioning costs.

Yankee Atomic disagrees with the Government's characterization of the assessment and contends that it is directly related to the earlier contracts. Yankee Atomic contends that the fixed-price nature of those contracts expressly limited its obligation to the price already paid, and shifted the risk of any additional costs (including decontamination and decommissioning costs) onto the Government. Yankee Atomic argues that the assessment breaches those contracts by, in effect, retroactively increasing the price that it must pay for the previously supplied uranium enrichment services.[2]

Resolution of this disputed characterization requires us to consider and apply two related bodies of law: the sovereign acts doctrine and the unmistakability doctrine. We consider each in turn.

IV

The sovereign acts doctrine stems from a series of decisions by the Court of Claims, and was first recognized by the United States Supreme Court in *Horowitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736 (1925). In that case, Horowitz submitted a bid to buy certain Habutai silk offered for sale by the Government. The Government agreed that Horowitz would be given the opportunity to re-sell the silk before paying the purchase price, and agreed to

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[2] Throughout its briefs, Yankee Atomic contends that the special assessment constitutes a breach of its contracts with the Government. Technically, however, this does not appear to be a case involving a breach of contract. Typically, a contract breach occurs while the contract is being performed, whereas the contracts in the present case have been fully performed by both parties. This appears to have been the view of the Court of Federal Claims, as indicated by the notable absence in its opinion of any reference to breach of contract. This distinction does not affect our decision, however. Regardless of whether the situation is characterized as a breach of contract, an unlawful taking, or an unlawful exaction, the arguments stem from Yankee Atomic's prior contracts with the Government.

ship the silk within a day or two after shipping instructions were given. *Id.* at 459, 45 S.Ct. at 344. Horowitz sold the silk to a silk company, paid the balance of the purchase price, and requested that the silk be shipped to the silk company at once. Because of a governmental embargo placed on the shipment of silk by freight, however, the silk was not shipped for several weeks. By the time it arrived, the price of silk had dropped significantly, and the consignee refused to accept delivery. As a result, Horowitz was forced to sell the silk at a loss. *Id.* at 460, 45 S.Ct. at 344.

Horowitz sued the United States, contending that the embargo breached the valid contract he had for sale and shipment of the silk. The United States Supreme Court rejected this argument because "[i]t has long been held by the Court of Claims that the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Id.* at 461, 45 S.Ct. at 344. The Court adopted the reasoning of the Court of Claims:

> The two characters which the government possesses as a contractor and as a sovereign cannot be thus fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. *Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.* . . . In this court the United States appear simply as contractors; and they are to be held liable only within the same limits that any other defendant would be in any other court. Though their sovereign acts performed for the general good may work

> injury to some private contractors, such parties gain nothing by having the United States as their defendants.

*Id.* (quoting *Jones v. United States*, 1 Ct.Cl. 383, 384 (1865)) (emphasis added).[3]

The Supreme Court recently discussed *Horowitz*, and the sovereign acts doctrine in general, in *United States v. Winstar Corp.*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996).[4] In *Winstar*, the plurality explained that the doctrine is designed to distinguish between the Government's twin roles as contractor and sovereign. *Id.* at ___, 116 S.Ct. at 2463. When the Government enters into a contract, "its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at ___-___, 116 S.Ct. at 2464-65. The Government-as-contractor cannot exercise the power of its twin, the

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[3] The Court of Claims expressed this same philosophy in *O'Neill v. United States*, 231 Ct.Cl. 823, 826 (1982), as follows:

> From its earliest days . . . application of the sovereign act[s] doctrine has proceeded from the recognition that in governing the country, the Government's actions, otherwise legal, will occasionally incidentally impair the performance of contracts. Were those contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party *for the governing action*. Given the large number of contracts the Government enters, *its* contracts will sometimes be affected by those same governing acts. The policy underlying the sovereign act[s] doctrine is that in those circumstances, *the Government in its contracting role, like its private counterpart, should not incur liability for its act done in the governing role*.

[4] The sovereign acts doctrine has also been cited in several other cases since *Horowitz*. *See, e.g., Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46, 102 S.Ct. 894, 905-06, 71 L.Ed.2d 21 (1982) (discussing that the petitioners confuse the Tribe's role as commercial partner with its role as sovereign); *Atlas Corp. v. United States*, 895 F.2d 745, 754 (Fed. Cir.1990) (explaining that the Uranium Mill Tailings Radiation Control Act was a sovereign act undertaken for the public good and, therefore, could not form the basis for a party's breach of contract claim).

Government-as-sovereign, for the purpose of altering, modifying, obstructing or violating the particular contracts into which it had entered with private parties. Such action would give the Government-as-contractor powers that private contracting parties lack.

On the other hand, the plurality explained, the Government-as-sovereign must remain free to exercise its powers. For this reason, the early Court of Claims cases "thought it 'grave error' to suppose that 'general enactments of Congress are to be construed as evasions of [the plaintiff's] particular contract.'" *Id.* at ___, 116 S.Ct. at 2464 (quoting *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865)). The sovereign acts doctrine attempts to "balance[ ] the Government's need for freedom to legislate with its obligation to honor its contracts by asking whether the sovereign act is properly attributable to the Government as contractor." [5] *Id.* at ___, 116 S.Ct. at 2465. Thus, it is not a hard and fast rule, but rather a case-specific inquiry that focuses on the scope of the legislation in an effort to determine whether, on balance, that legislation was designed to target prior governmental contracts.

Under the sovereign acts doctrine, therefore, we must decide whether the Government, in enacting the relevant provisions of the Energy Policy Act of 1992, was (i) acting for the purpose of retroactively increasing the price of its earlier contracts with Yankee Atomic (*i.e.*, the legislation was passed for the benefit of the Government-as-contractor) or (ii) acting for the purpose of solving the problem of

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[5] The concurring and dissenting justices agreed with this general statement of the doctrine. Under the facts of *Winstar*, *see infra* section IV.A, only three justices concluded that the congressional act was not a sovereign one (*i.e.*, the act was attributable to the Government-as-contractor). The remaining justices either viewed the act as a sovereign one or decided the case on another basis.

decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public). We conclude it was the latter.

As explained above, we must begin by examining the scope of the Energy Policy Act; only then can we determine whether the Act is designed with the purpose of affecting or altering the Government's prior contracts. The Energy Policy Act requires contribution to the Fund from any domestic utility that purchased separative work units from the DOE before the Act's passage. 42 U.S.C. § 2297g-1(c) (1994). Importantly, however, the scope of the Act is not coincident with those domestic utilities that had previously entered into contracts with the DOE for uranium enrichment services, because the Act *does not* require contribution from a utility that contracted with the DOE if that utility re-sold the purchased services to another utility. *See* 42 U.S.C. § 2297g-1(c)(2). In contrast, the Act *does* require contribution from any utility that did not have a contract with the DOE but nonetheless benefited from the DOE's services by purchasing through the secondary market. *See* 42 U.S.C. § 2297g-1(c)(1). Thus, some utility/Government contracts are not embraced by the Act, while some purchases from private entities are covered. The key is whether the purchaser was the ultimate beneficiary of the DOE's services.

The reach of the Act, therefore, makes clear that Congress was not focused on a retroactive increase in the price of the Government's prior contractual agreements. Rather than targeting those utility companies that had prior contracts with the Government, the Act targets whichever utility eventually used and benefited from the DOE's enrichment services. Congress's main purpose was to spread the costs of a problem that it realized only after the contracts had been performed. *Cf. Atlas Corp.*, 895 F.2d at 748 (noting that the dangers and clean-up costs associated with uranium milling operations were not fully recognized until the late 1970s). It did so by dividing the costs between: (i) the Government, which was

responsible for at least $330 million per year to be raised through general appropriations, and (ii) those domestic utilities that benefited from the DOE's uranium enrichment services. Any impact that this approach may have on those utilities with which the Government had prior contracts is "merely incidental to the accomplishment of a broader governmental objective." *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2466.

In characterizing the essence of the Act, Yankee Atomic focuses only on the provisions that impact those utilities that contracted with the Government and that themselves used the enrichment services. While it is true that Yankee Atomic has no quarrel with the Government over its liability on consumption of enrichment services supplied by nongovernmental entities through the secondary market, that fact cannot render irrelevant the Act's provisions that reach even those utilities that did not contract with the Government. When construing an act of Congress, and especially when determining the essential characteristic of a particular statute, we must observe and understand the statute as a whole. *See Crandon v. United States*, 494 U.S. 152, 158, 110 S.Ct. 997, 1001, 108 L.Ed.2d 132 (1990) ("In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy."); *Richards v. United States*, 369 U.S. 1, 11, 82 S.Ct. 585, 591-92, 7 L.Ed.2d 492 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act."); *In re Nantucket, Inc.*, 677 F.2d 95, 98 (C.C.P.A.1982) ("Each part or section of a statute should be construed in connection with every other part or section so as to produce a harmonious whole, and it is not proper to confine interpretation to the one section to be construed." (citation omitted)). Statutory provisions that are relevant, or as here, controlling, to our interpretation cannot be ignored simply because they are not dispositive to the facts before us.

Similarly, the opinion of the Court of Federal Claims seems to have been mistaken in reasoning: "The [sovereign acts doctrine] argument would have some force if we were dealing with a general tax that fell on all utilities alike. That, however, is not our case. Rather, *this special assessment reaches only those utility companies that previously had contracted with the Government* for the purchase of uranium enrichment services." 33 Fed. Cl. at 585 (emphasis added). As explained above, the special assessment does not reach only those utility companies that previously contracted with the Government; it also reaches those utilities that purchased the services through the secondary market but had *no* contracts with the Government. Ironically, then, the assessment appears to be very similar to what the Court of Federal Claims thought it was not: a general tax that falls proportionally on all utilities that benefited from the DOE's uranium enrichment services.[6]

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[6] To the extent that the Energy Policy Act is designed to spread the costs of a societal problem, it is not unlike other instances where Congress has enacted legislation to spread societal costs. One such example involves the costs of cleaning up hazardous waste under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 et. seq. (1994). *See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir.1986). The defendants in those lawsuits have frequently challenged the retroactive application of CERCLA as a violation of their due process rights and as an unconstitutional taking. The courts, however, have rejected those arguments. *See id.* at 734 (rejecting due process challenge because "Congress acted in a rational manner in imposing liability for the cost of cleaning up such sites upon those parties who created and profited from the sites and upon the chemical industry as a whole").

Yankee Atomic contends that the CERCLA cases, and others like them, are inapposite because they involve the impact of legislation on private parties and therefore do not implicate the Government's self-interest. *See Perry v. United States*, 294 U.S. 330, 350-51, 55 S.Ct. 432, 434-35, 79 L.Ed. 912 (1935). We cite the CERCLA cases not for their insight as to

The broad reach of the Energy Policy Act also distinguishes the present case from two cases upon which Yankee Atomic and the Court of Federal Claims relied: *Lynch v. United States*, 292 U.S. 571, 54 S.Ct. 840, 78 L.Ed. 1434 (1934), and *Perry v. United States*, 294 U.S. 330, 55 S.Ct. 432, 79 L.Ed. 912 (1935).

In *Lynch*, the plaintiffs had entered into agreements with the United States for War Risk Insurance and had paid the prescribed monthly premiums. 292 U.S. at 576, 54 S.Ct. at 842. Congress subsequently enacted the Economy Act which included a clause stating: "All laws granting or pertaining to yearly renewable term insurance are hereby repealed." *Id.* at 575, 54 S.Ct. at 842. The Supreme Court held the legislation unlawful without discussing the sovereign acts doctrine, which is not surprising given that the clause was clearly directed to abrogating past war risk insurance contracts for reasons of economy. As the Court stated: "No doubt there was in March, 1933, great need of economy. . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States." *Id.* at 580, 54 S.Ct. at 844.

In *Perry*, the plaintiff owned a $10,000 government bond which, when redeemed, required the United States to pay in "gold coin of the present standard of value." 294 U.S. at 346-47, 55 S.Ct. at 433. Congress later passed a joint resolution which stated that payment of obligations in gold was against public policy and, therefore, all obligations shall be discharged by payment in currency that is legal tender. *Id.* at 349, 55 S.Ct. at 434. The enactment specifically stated that "provisions for payment in gold, 'contained in any law authorizing obligations to be issued by or under authority of

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Congress's motives in enacting the Energy Policy Act, but rather for their general proposition that the costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem.

the United States,' were repealed." *Id.* Based on this clear expression of an intention to abrogate past contracts, the Court again held the act unlawful without discussing the sovereign acts doctrine.

In sum, *Lynch* and *Perry* both involved situations where the congressional act made clear that its purpose was, at least in part, to abrogate past public contracts. The Energy Policy Act, in contrast, reveals no such purpose of targeting past contracts. Instead, the Act taxes all beneficiaries of the DOE's uranium enrichment services.

Given the focus of the relevant provisions of the Energy Policy Act, we conclude that it constitutes a general exercise of Congress's taxing power for the purpose of addressing a societal problem rather than an act that retroactively increases the price charged to contracting parties for uranium enrichment services. This conclusion does not end our inquiry, however. We must further consider whether the Government, by contract with Yankee Atomic, has surrendered the right to exercise this sovereign power "in terms which admit of no other reasonable interpretation." *Merrion*, 455 U.S. at 148, 102 S.Ct. at 907. This requires us to consider and apply the unmistakability doctrine.

V

As the Supreme Court plurality recently explained in *Winstar*, the modern unmistakability doctrine "marks the point of intersection between two fundamental constitutional concepts." *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2453. One concept, which developed in England, is that of parliamentary sovereignty. This concept posits that because the legislature has absolute authority and acknowledges no superior power, it cannot be bound by acts of a prior legislature. *Id.* The other concept, which developed in the United States, is that legislative power may be limited under certain circumstances. Unlike the absolute power enjoyed by the Parliament in England, the legislature in the United States is "subject to the

overriding dictates of the Constitution and the obligations that it authorizes." *Id.* at ___-___, 116 S.Ct. at 2453-54. One such limitation is that embodied in the Contracts Clause, which prohibits a state from passing any law that impairs the obligation of contracts. *See* U.S. Const., Art. I, § 10, cl. 1. Although the Contracts Clause does not apply to acts of the United States, "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights. . . . The extent of that capacity, to be sure, remains somewhat obscure." *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2455 (citations omitted).

The modern unmistakability doctrine is a canon of construction that attempts to balance these two somewhat competing concepts by allowing the Government to make agreements that bind future Congresses, but only if those contracts contain an unmistakable promise. Thus, the plurality in *Winstar* summarized the almost 160-year history of the unmistakability doctrine as follows:

> [A] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress), nor will an ambiguous term of a grant or contract be construed as a conveyance or surrender of sovereign power.

*Id.* at ___, 116 S.Ct. at 2456.[7]

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[7] The remaining justices in *Winstar* essentially agreed with this formulation of the doctrine, although they disagreed with its application to the facts of that case. The two dissenting justices viewed the doctrine to embody the notion that "a waiver of sovereign authority will not be implied, but instead must be surrendered in unmistakable terms." *Id.* at ___, 116 S.Ct. at 2480 (Rehnquist, J., dissenting). The three concurring justices stated the doctrine as follows:

> [I]t is reasonable to presume (unless the opposite clearly appears) that the sovereign does not promise that none of its multifarious sovereign acts, needful for the public good, will incidentally disable

In *Winstar*, the justices were divided as to whether or not the unmistakability doctrine was even applicable, given the facts of that case. Therefore, we next address the issue of whether the doctrine is applicable under the facts of the present case.

A

The plurality of justices in *Winstar* decided that the unmistakability doctrine was not applicable. *Winstar* involved the fallout from the crisis involving the savings and loan industry in the late 1970s and early 1980s. The Government induced healthy thrifts to merge with ailing ones by agreeing to provide favorable regulatory treatment, which would allow the healthy thrifts to count towards their capitalization requirements certain "supervisory goodwill" generated by the mergers. *Winstar*, 518 U.S. at ___-___, 116 S.Ct. at 2442-43. This scheme, however, was ultimately unsuccessful in resolving the thrift industry crisis. As a result, Congress enacted the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), which required that all thrift institutions no longer use "supervisory goodwill" to meet their capitalization requirements. This immediately caused several thrifts to fall out of compliance with capitalization requirements, thereby making them subject to seizure by thrift regulators. *Id.* at ___, 116 S.Ct. at 2446. The thrifts filed suit claiming breach of contract.

After reciting the history of the unmistakability doctrine, the *Winstar* plurality stated:

> The cases extending back into the 19th-century thus stand for a rule that applies when the Government is subject either to a claim that its contract has surrendered

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it or the other party from performing one of the promised acts. . . . Governments do not ordinarily agree to curtail their sovereign or legislative powers, and contracts must be interpreted in a common-sense way against that background understanding. *Id.* at ___, 116 S.Ct. at 2477 (Scalia, J., concurring).

> a sovereign power (e.g., to tax or control navigation), or to a claim that cannot be recognized without creating an exemption from the exercise of such a power. . . . *The application of the doctrine thus turns on whether enforcement of the contractual obligation would block the exercise of a sovereign power of the Government.*

*Id.* at ___-___, 116 S.Ct. at 2456-57 (footnote omitted; emphasis added). The plurality held that the doctrine was inapplicable because the contracts with the thrifts did not preclude the Government from later exercising its sovereign powers. Instead, the contracts merely shifted the risk of loss onto the Government, thereby requiring it to "indemnify its contracting partners against financial losses arising from regulatory change." *Id.* at ___, 116 S.Ct. at 2461.

Five justices disagreed with the plurality's conclusion that the unmistakability doctrine was not available simply because the contracts were risk-shifting agreements. The three concurring justices pointed out that the plurality's approach was inconsistent with precedent, which had "not made the availability of these sovereign defenses (as opposed to their validity on the merits) depend upon the nature of the contract at issue." *Id.* at ___, 116 S.Ct. at 2476. Moreover, "[v]irtually every contract operates, not as a guarantee of particular future conduct, but as an assumption of liability in the event of nonperformance." *Id.* Despite this difference, these three justices concurred because they believed that the contracts contained unmistakable promises to continue the favorable regulatory treatment. *Id.* at ___-___, 116 S.Ct. at 2477-78. The two dissenting justices concluded that the doctrine applied and that the contracts did not contain an unmistakable promise against future regulatory change.

Based on the reasoning contained in the *Winstar* opinions, we conclude that the unmistakability doctrine applies in the present case. This conclusion respects the views of the five justices who stated that the application of the doctrine is

unrelated to the nature of the underlying contracts. In addition, our conclusion is in harmony with the views of the plurality justices. To be sure, the contracts at issue in the present case may be viewed as risk-shifting agreements, similar to those that the *Winstar* plurality found not to implicate the unmistakability doctrine. As mentioned above, the contracts at issue are fixed-price contracts, and the Supreme Court has held that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918). Similarly, our predecessor court has stated that "the [seller] in a fixed-price contract assumes the risk of unexpected costs. In firm fixed-price contracts, risks fall on the [seller], and the [seller] takes account of this through his prices." *ITT Arctic Servs., Inc. v. United States*, 207 Ct.Cl. 743, 524 F.2d 680, 691 (1975) (citations omitted).

Importantly, however, the plurality also expressly stated that application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government. *Winstar* 518 U.S. at ___-___, 116 S.Ct. at 2457-58. As explained above, the assessment at issue in the present case is a general, sovereign act. Although Yankee Atomic seeks money damages, its argument would effectively block the exercise of this sovereign power to tax, for if Yankee Atomic were to prevail, the Government would be required to refund the entire amount assessed. This is akin to a tax rebate, which even the plurality seemed to recognize as a block to the exercise of sovereign power. *See id.* at ___, 116 S.Ct. at 2458 ("Granting a rebate, like enjoining enforcement, would simply block the exercise of the taxing power.").

B

Having decided that the unmistakability doctrine applies, we next address the merits of the arguments on that issue. This requires us to decide whether the contracts between Yankee Atomic and the Government unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax. We conclude that no such promise existed in the contracts.

We begin by noting that none of the contracts expressly states that Yankee Atomic will be immune from any future assessments made by the Government upon the industry as a whole. Yankee Atomic acknowledges the lack of any such express statement, but instead relies on the fixed-price nature of the contract. Yankee Atomic argues that "[t]he fixed-price contract terms are hardly implicit, and they *forbid* a future price increase." Although the contracts include fixed-price terms, we must determine whether those terms unmistakably encompassed future taxes or assessments.

To determine the scope of those fixed price terms, we look to the language of the contracts. Although the language of the several contracts varies somewhat, the contract executed on March 9, 1971, entitled "Agreement For Furnishing Uranium Enrichment Services" is representative. Article III of that agreement provides, in part:

> 1. The charges to be paid to the Commission for enriching services provided to the Customer hereunder shall be determined in accordance with the established Commission pricing policy for such services; provided, however, that the unit charge for enriching services during the term of this agreement shall in no event exceed a ceiling charge of $30.00 (subject to possible adjustment [for labor and power costs] pursuant to Section 3 of this article) per Kg unit of separative work for separation of U-235 from U-238, as defined in the established Commission pricing policy.

From examining the contracts, we decide that the fixed-price terms of the contract do not constitute an unmistakable promise on behalf of the Government that it will not impose a general assessment upon all utility companies that benefited from the DOE's uranium enrichment services. The language of the contract is directed at the prices charged for providing enriched uranium to Yankee Atomic, and not to any decontamination or decommissioning costs which may subsequently arise. Thus, the contract states that "[t]he charges [are] to be paid to the Commission *for enriching services provided*," and sets a ceiling price of $30 per Kg unit "for separation of U-235 from U-238."

The Government complied with this provision by providing the enriched uranium at the agreed-upon price. At that point, the contract was fully performed by both parties. This gave Yankee Atomic a vested contract right which would then bar the Government from deliberately attempting to charge more for performance of those contracts. As explained above in the sovereign acts doctrine discussion, however, the subsequent assessment is not a deliberate retroactive increase in the price of those contracts. Instead, it is the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government.

The opinion of the Court of Federal Claims is not clear as to whether or not it discerned an unmistakable promise that barred the subsequent special assessment. On the one hand, after reciting several unmistakability doctrine cases, the court stated: "*But even where a contract does not contain language securing protection from the potentially disruptive effects of subsequent legislation*, exercise of the sovereign power does not proceed unchecked." 33 Fed. Cl. at 584. The under-scored portion of this statement indicates that the court viewed the contracts as containing no unmistakable promise that precluded the Government from later imposing an assessment.

On the other hand, the court's opinion can be read to indicate that it found such an unmistakable promise. The court explained that the congressional acts required the AEC to charge prices that assured reasonable compensation to the Government, which was later defined as recovery of the Government's costs over a reasonable period of time. Based on these legislative mandates, the court stated: "[i]n short, there was no want of authority in the administering agency to price the Government's services so as to recapture, over time, all costs associated with the delivery of those services." 33 Fed. Cl. at 584. This indicates that the court implied an unmistakable promise from legislative mandates. To the extent that the Court of Federal Claims implied an unmistakable promise from the legislative acts, we conclude it erred. Put simply, a specific promise implied from general legislative acts is not an unmistakable one.

Therefore, we conclude that the contracts between Yankee Atomic and the Government did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services.[8]

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[8] Our conclusion on this point also resolves Yankee Atomic's takings argument. Because the contracts did not contain an unmistakable promise against a future assessment, Yankee Atomic had no property right (via a vested contract right) which was subsequently taken by the assessment. At most, Yankee Atomic has a vested right to be immune from later attempts to retroactively increase the prices charged. This right has not been taken because, as explained in the sovereign acts discussion, the assessment is a general, sovereign act rather than a retroactive price increase. For the same reason, *Lynch* and *Perry* are inapposite. In each of those cases, the Government's action directly abrogated prior vested contractual rights. *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2455 (stating that "it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights," and citing *Perry* and *Lynch* ).

## VI

Yankee Atomic also contends that even if we should rule against it on its contractual arguments, it should nonetheless prevail on its statutory argument. Yankee Atomic argues that the Energy Policy Act applies only to "domestic utilities," and that the meaning of that term is provided by the following language:

> Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

42 U.S.C. § 2297g-1(g). Yankee Atomic argues that this language plainly indicates that "domestic utility" encompasses only those utilities that are currently generating and selling electricity. Because Yankee Atomic ceased operation eight months before passage of the Act, it is not a "domestic utility." As a result, Yankee Atomic asserts that the entire assessment, including that levied on Yankee Atomic's purchase in the secondary market, would constitute an unlawful exaction. We disagree with this argument.

The plain language of the Energy Policy Act explains which utilities are covered by its scope. The Act clearly states that "[t]he Secretary shall collect a special assessment from domestic utilities." 42 U.S.C. § 2297g- 1(c). The Act further states that a utility is responsible for contribution to the Decontamination and Decommissioning Fund if it purchased uranium enrichment services from the DOE, either directly or indirectly, but utility company. 42 U.S.C. §§ 2297g-1(c)(1), (2). Thus, the plain language of the statute sets the parameters of its scope. Because Yankee Atomic purchased uranium enrichment services from the DOE, both directly and indirectly, it falls within the Act's scope.

The provision cited by Yankee Atomic, § 2297g-1(g), does not contradict this plain meaning. That provision merely addresses the issue of how the special assessment should be treated in determining utility rates. By defining the assessment as a current cost of fuel, Congress clears the path for the domestic utilities to pass through the assessment to current customers. This avoids any complications from the Federal Energy Regulatory Commission, which has ruled that although customers can be charged for current fuel costs, they cannot be charged for certain prior costs. *See, e.g., Northern States Power Co.*, 58 FERC ¶ 61,119 (Feb. 6, 1992). Section 2297g-1(g) does not, however, *sub silentio* create an exception which takes certain utilities out of the reach of the assessment.

Therefore, we conclude that Yankee Atomic is not exempt from the assessment by virtue of its nonoperating status at the time the Act was passed. The Act plainly defines the scope of the assessment, and Yankee Atomic has not cited any contrary intention by Congress.

VII

In conclusion, the provision of the Energy Policy Act which imposes the special assessment is a sovereign act because it is designed to spread the costs associated with the decontamination and decommissioning over all domestic utilities that used the DOE's uranium enrichment services, rather than targeting only those utilities that had contracts with the Government. Moreover, the contracts between Yankee Atomic and the Government did not contain an unmistakable promise which precluded the Government from exercising this sovereign power. Finally, Yankee Atomic is not exempt from the assessment by virtue of the fact that it ceased operations before the Act's passage. Accordingly, the judgment of the Court of Federal Claims is reversed.

No costs.

*REVERSED.*

MAYER, *Circuit Judge*, dissenting.

More than a century ago, the Supreme Court held that the government cannot deprive a party with which it contracts "of the fruits actually reduced to possession of contracts lawfully made." *Sinking Fund Cases*, 99 U.S. 700, 720, 25 L.Ed. 496 (1879); *see also Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55, 106 S.Ct. 2390, 2398, 91 L.Ed.2d 35 (1986). In levying the special assessments required by 42 U.S.C. § 2297g-1 against Yankee Atomic Electric Company (Yankee), the government improperly diminished the value of Yankee's contractual "fruits." The Court of Federal Claims held that this was an "unlawful exaction," and I agree. I would affirm.

The parties do not dispute that the contracts at issue were fixed-price contracts. "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136, 39 S.Ct. 59, 61, 63 L.Ed. 166 (1918); *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed.Cir.1996) ("Because fixed-price contracts do not contain a method for varying the price of the contract in the event of unforeseen circumstances, they assign the risk to the [seller] that the actual cost of performance will be higher than the price of the contract."). As the seller of uranium enrichment services, the government bore the risk of any unforeseen difficulties or increased costs that might arise out of its performance of the contracts.

The parties also agree that the contracts were fully and satisfactorily performed. Once a contract is completed, the contractual relationship ends and there is no privity between the parties. *M. Bianchi of Cal. v. Perry*, 31 F.3d 1163, 1167-68 (Fed.Cir.1994); *John J. Kirlin, Inc. v. United States*, 827 F.2d 1538, 1541 (Fed.Cir.1987). Consequently, Yankee cannot prevail on its claim that the government breached the

contracts at issue years after they were finished. *See Mulholland v. United States*, 175 Ct.Cl. 832, 361 F.2d 237, 239-40 (1966) (at the latest, a breach of contract claim accrues when the contract is completed); *cf. Henke v. United States*, 60 F.3d 795, 799-800 (Fed.Cir.1995).

Contracts, however, are property, "whether the obligor be a private individual, a municipality, a State, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment" of the United States Constitution. *Lynch v. United States*, 292 U.S. 571, 579, 54 S.Ct. 840, 843, 78 L.Ed. 1434 (1934); *see also Bowen*, 477 U.S. at 52, 106 S.Ct. at 2396-97 (the government "has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003, 104 S.Ct. 2862, 2873, 81 L.Ed.2d 815 (1984) ("[V]alid contracts are property within meaning of the Taking Clause."); *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 278 n. 31, 89 S.Ct. 518, 524 n. 31, 21 L.Ed.2d 474 (1969). The Fifth Amendment prohibits the federal government from depriving a person of property "without due process of law" and from taking private property "without just compensation." U.S. Const. amend. V; *Lynch*, 292 U.S. at 579, 54 S.Ct. at 843; *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-64, 101 S.Ct. 446, 452, 66 L.Ed.2d 358 (1980) (where state collected a service charge, subsequently-imposed fee for the same service was an unconstitutional taking).

The government does not contend that its contracts with Yankee were invalid. So, there can be no doubt that once Yankee's contracts had been satisfactorily performed, its rights under those contracts were fully-vested property rights. Consequently, the government cannot deprive Yankee of the benefits of those contracts. *See Sinking Fund Cases*, 99 U.S. at 720.

To ascertain Yankee's vested property rights, we must look to the contracts themselves. The bargain struck between the

government and Yankee was simple. The government, through the Atomic Energy Commission and its successor agencies, was to provide uranium enrichment or separation services for Yankee. In return, Yankee was to pay a fixed price per separative work unit, the common measure by which uranium enrichment services are sold. Between 1963 and 1983, Yankee purchased approximately 804,000 separative work units at prices ranging from less than $26 to more than $149 per unit. Because of the fixed-price nature of these contracts, Yankee was entitled to pay no more than the agreed-upon price. The government, on the other hand, was assigned the risk for any unforeseen difficulties that might arise or the risk that actual performance costs would be higher than the contract price.

The sole basis upon which Congress imposed the special assessments which Yankee seeks to recover is that Yankee had purchased uranium enrichment services from the government. These assessments were calculated based on the percentage of the total separative work units produced by the government which Yankee had purchased directly. This is tantamount to a retroactive price increase. It levies a charge on Yankee solely because it had previously purchased enrichment services from the government. But those purchases were made via fixed-price contracts. The assessment effectively requires Yankee to pay for the additional costs the government incurred as a result of performing uranium enrichment services; the very same costs for which the government assumed the risk. Thus, the government retroactively abrogated the essence of the contracts at issue. "But Congress [is] without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure would be not the practice of economy, but an act of repudiation." *Perry*, 294 U.S. at 352-53, 55 S.Ct. at 436.

It is of no moment that the reason for the assessment is to relieve the government from shouldering entirely the

unforeseen costs incurred in providing those services, from which Yankee had benefited. Yankee fully paid the government for those benefits, and as the seller of the enrichment services, the government bore the burden for any unforeseen costs. The Fifth Amendment "was designed to bar Government from forcing some people alone to bear public burdens which . . . should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S.Ct. 1563, 1569, 4 L.Ed.2d 1554 (1960); *cf. United States v. Winstar Corp.*, 518 U.S. 839, ___, 116 S.Ct. 2432, 2459, 135 L.Ed.2d 964 (1996) (the government may not "simply shift costs of legislation onto its contractual partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change").

Nor is it of any great import that the assessment is levied on some utilities that did not contract directly with the government. First, that is not the case before us. Yankee seeks to recover only assessments based on its direct purchases from the government. It does not challenge charges based on secondary market purchases, which, according to the government at argument, constitute just 15% of the total assessments. Moreover, the same argument, that legislation was not targeted solely at those with whom the government had contracted, was made by the government and rejected by the Court in *Winstar*. "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." 518 U.S. at ___, 116 S.Ct. at 2468. The government concedes that 85% of the special assessment falls on utilities that had procured enrichment services directly from the government. Clearly then, the assessment's impact falls substantially on the government's contracting partners. That a small fraction of others who indirectly

purchased enrichment services from the government also must pay the assessment does not mask its true identity as a retroactive price increase.

The government invokes the familiar sovereign acts and unmistakability doctrines in support of its position that the special assessment did not abrogate Yankee's vested contract rights. Neither shields the government.

The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." *Horowitz v. United States*, 267 U.S. 458, 461, 45 S.Ct. 344, 344, 69 L.Ed. 736 (1925). "[T]he essential point [of the doctrine is] to put the Government in the same position that it would have enjoyed as a private contractor." *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2463. This doctrine is wholly inapplicable. Properly understood, it is a government defense to breach of contract and other contractor claims that a governmental act adversely affected contract performance. But this is not a breach of contract case. Nor did Congress' enactment of the special assessment obstruct performance of the contracts, as contemplated by *Horowitz*. The contracts were fully and successfully performed by both parties. But even assuming the doctrine applied, it would not insulate the government from liability because the impact of the special assessment falls so substantially and directly on Yankee and the government's other contractors. *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2469 ("[T]he extent to which [the legislation there at issue] relieved the Government of its own contractual obligations precludes a finding that the statute is a 'public and general' act for purposes of the sovereign acts defense.").

The unmistakability doctrine, on the other hand, is simply a "canon of contract construction," *Winstar*, 518 U.S. at ___, 116 S.Ct. at 2448, which says that "a contract with a sovereign government will not be read to include an unstated

term exempting the other contracting party from the application of a subsequent sovereign act (including an act of Congress)," *id.* at ___, 116 S.Ct. at 2456. Its application "turns on whether enforcement of the contractual obligation alleged would block the exercise of a sovereign power," such as the power to tax. *Id.* at ___, 116 S.Ct. at 2457. But this doctrine too is inapplicable. It is not enforcement of a "contractual obligation," per se, that is at issue. Rather, Yankee seeks reimbursement for the improper abrogation of its vested property rights, which happened to arise out of the completed contracts. That is, it seeks money damages for the government's deprivation "of the fruits actually reduced to possession" of the contracts at issue. *See Sinking Fund Cases*, 99 U.S. at 720.

Even assuming, for the sake of argument, the unmistakability doctrine applied, it adds little. The parties agree that the contracts, out of which Yankee's property rights arose, had fixed prices and that the government bore the risk of unforeseen costs that might arise. They merely disagree about the legal consequences that flow from this interpretation. But Yankee needed no more than the fixed-price contract terms to insulate itself from a post-performance price hike. It did not need an additional, second promise not to have the contract price increased after completion. *See Winstar*, 518 U.S. at ___, 116 S.Ct. at 2461 (there is "no need for an unmistakably clear 'second promise' "); *id.* at ___, 116 S.Ct. at 2477 (Scalia, Kennedy, Thomas, JJ., concurring) (there need be no "*further* promise not to go back on the promise" made).

That is not to say that Yankee would be immune from every assessment or tax relating to decontaminating and decommissioning the government enrichment facilities, no matter how general or broad its application, solely because it had a fixed-price contract. But where, as here, the impact of

the tax falls so substantially and directly on Yankee and the government's other contracting partners, it amounts to a retroactive price increase, which cannot stand.

When the government improperly exacts or takes one's money "'in contravention of the Constitution, a statute, or a regulation,'" an illegal exaction has occurred, and the payor is entitled to recoupment. *Aerolineas Argentinas v. United States*, 77 F.3d 1564, 1572-73 (Fed.Cir.1996); *Eastport S.S. Corp. v. United States*, 178 Ct.Cl. 599, 372 F.2d 1002, 1007 (1967). In other words, "an illegal exaction has occurred when 'the Government has the citizen's money in its pocket.' "*Aerolineas Argentinas*, 77 F.3d at 1573 (quoting *Clapp v. United States*, 127 Ct.Cl. 505, 512, 117 F.Supp. 576, 580 (1954)). The government has Yankee's money in its pocket. It illegally exacted that money in contravention of Yankee's rights under the Fifth Amendment. Yankee is entitled to recover it.

# APPENDIX G

A. PERTINENT PROVISIONS OF EPACT AS ENACTED (PUBLIC LAW 102-486—OCT. 24, 1992)

1. PERTINENT PROVISIONS OF TITLE IX (106 STAT. 2929 *ET SEQ.*)

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## TITLE IX—UNITED STATES ENRICHMENT CORPORATION

### SEC. 901. ESTABLISHMENT OF THE UNITED STATES ENRICHMENT CORPORATION.

The Atomic Energy Act of 1954 (42 U.S.C. §§ 2011 *et seq.*) is amended by adding at the end the following new title:

## "TITLE II—UNITED STATES ENRICHMENT CORPORATION

## "CHAPTER 22—GENERAL PROVISIONS

* * * *

"SEC. 1202. PURPOSES. [42 U.S.C. § 2297a.]

"The Corporation is created for the following purposes:

"(1) To operate as a business enterprise on a profitable and efficient basis.

"(2) To maximize the long-term value of the Corporation to the Treasury of the United States.

"(3) To lease Department uranium enrichment facilities, as needed.

"(4) To acquire uranium for uranium enrichment, low-enriched uranium for resale, and highly enriched uranium for conversion into low-enriched uranium, as needed.

"(5) To market and sell its enriched uranium and uranium enrichment and related services to—

"(A) the Department for governmental purposes; and

"(B) domestic and foreign persons, as provided in section 1303(6).

"(6) To conduct research and development as required to meet business objectives for the purposes of identifying, evaluating, improving, and testing alternative technologies for uranium enrichment.

"(7) To conduct the business as a self-financing corporation and eliminate the need for Federal Government appropriations or sources of Federal financing other than those provided in this title.

"(8) To help maintain a reliable and economical domestic source of uranium enrichment services.

"(9) To comply with laws, and regulations promulgated thereunder, to protect the public health, safety, and the environment.

"(10) To continue at all times to meet the objectives of ensuring the Nation's common defense and security, including abiding by United States laws and policies concerning special nuclear materials and nonproliferation of atomic weapons and other nonpeaceful uses of atomic energy.

"(11) To take all other lawful actions in furtherance of these purposes.

"CHAPTER 23—ESTABLISHMENT, POWERS, AND ORGANIZATION OF CORPORATION

"SEC. 1301. ESTABLISHMENT OF THE CORPORATION. [42 U.S.C. § 2297b.]

"(a) IN GENERAL.—There is established a body corporate to be known as the United States Enrichment Corporation.

"(b) GOVERNMENT CORPORATION.—The Corporation shall be established as a wholly owned Government corporation subject to chapter 91 of title 31, United States Code (commonly referred to as the Government Corporation Control Act), except as otherwise provided in this title.

"(c) FEDERAL AGENCY.—The Corporation shall be an agency and instrumentality of the United States.

* * * *

"CHAPTER 24—RIGHTS, PRIVILEGES, AND ASSETS OF THE CORPORATION

* * * *

"SEC. 1403. LEASING OF GASEOUS DIFFUSION FACILITIES OF DEPARTMENT. [42 U.S.C. § 2297c-2.]

"(d) DOE RESPONSIBILITY FOR PREEXISTING CONDITIONS—The payment of any costs of decontamination and decommissioning, response actions, or corrective actions with respect to conditions existing before the transition date, in connection with property of the Department leased under subsection (a), shall remain the sole responsibility of the Department.

* * * *

"SEC. 1404. CAPITAL STRUCTURE OF CORPORATION. [42 U.S.C. § 2297c-3.]

"(a) CAPITAL STOCK—

"(1) ISSUANCE TO SECRETARY OF THE TREASURY—The Corporation shall issue capital stock representing an equity investment equal to the greater of—

"(A) $3,000,000,000; or

"(B) the book value of assets transferred to the Corporation, as reported in the Uranium Enrichment Annual Report for fiscal year 1991, modified to reflect continued depreciation and other usual changes that occur up to the transfer date.

The Secretary of the Treasury shall hold such stock for the United States, except that all rights and duties pertaining to management of the Corporation shall remain vested in the Board.

"(2) RESTRICTION ON TRANSFERS OF STOCK BY UNITED STATES—The capital stock of the Corporation shall not be sold, transferred, or conveyed by the United States, except to carry out the privatization of the Corporation under section 1502.

"(3) ANNUAL ASSESSMENT—The Secretary of the Treasury shall annually assess the value of the stock held by the Secretary under paragraph (1) and submit to the Congress a report setting forth such value. The annual assessment of the Secretary shall be subject to review by an independent auditor.

"(b) PAYMENT OF DIVIDENDS—The Corporation shall pay into miscellaneous receipts of the Treasury of the United States or such other fund as is provided by law, dividends on the capital stock, out of earnings of the Corporation, as a return on the investment represented by such stock. Until privatization occurs under section 1502, the Corporation shall

pay as dividends to the Treasury of the United States all net revenues remaining at the end of each fiscal year not required for operating expenses or for deposit into the Working Capital Account established in section 1316.

"(c) PROHIBITION ON ADDITIONAL FEDERAL ASSISTANCE—Except as otherwise specifically provided in this title, the Corporation shall receive no appropriations, loans, or other financial assistance from the Federal Government.

"(d) SOLE RECOVERY OF UNRECOVERED COSTS—Receipt by the United States of the proceeds from the sale of stock issued by the Corporation under subsection (a)(1), and the dividends paid under subsection (b), shall constitute the sole recovery by the United States of previously unrecovered costs (including depreciation and imputed interest on original plant investments in the Department's gaseous diffusion plants) that have been incurred by the United States for uranium enrichment activities prior to the transition date.

* * * *

"SEC. 1406. LIABILITIES. [42 U.S.C. § 2297c-5.]

"(a) LIABILITIES BASED ON OPERATIONS BEFORE TRANSITION.—Except as otherwise provided in this title, all liabilities attributable to operation of the uranium enrichment enterprise before the transition date shall remain direct liabilities of the Department.

"(b) JUDGMENTS BASED ON OPERATIONS BEFORE TRANSITION.—Any judgment entered against the Corporation imposing liability arising out of the operation of the uranium enrichment enterprise before the transition date shall be considered a judgment against and shall be payable solely by the Department.

"(c) REPRESENTATION.—With regard to any claim seeking to impose liability under subsection (a) or (b), the United States shall be represented by the Department of Justice.

"(d) JUDGMENTS BASED ON OPERATIONS AFTER TRANSITION.—Any judgment entered against the Corporation arising from operations of the Corporation on or after the transition date shall be payable solely by the Corporation from its own funds. The Corporation shall not be considered a Federal agency for purposes of chapter 171 of title 28, United States Code.

* * * *

## "CHAPTER 25—PRIVATIZATION OF THE CORPORATION

### "SEC. 1501. STRATEGIC PLAN FOR PRIVATIZATION. [42 U.S.C. § 2297d.]

"(a) IN GENERAL.—Within 2 years after the transition date, the Corporation shall prepare a strategic plan for transferring ownership of the Corporation to private investors. The corporation shall revise the plan as needed.

"(b) CONSIDERATION OF ALTERNATIVE MEANS OF TRANSFERRING OWNERSHIP.—The plan shall include consideration of alternative means for transferring ownership of the Corporation to private investors, including public stock offering, private placement, or merger or acquisition. The plan may call for the phased transfer of ownership or for complete transfer at a single point of time. If the plan calls for phased transfer of ownership, then—

"(1) privatization shall be deemed to occur when 100 percent of ownership has been transferred to private investors;

"(2) prior to privatization, such stock shall be nonvoting stock; and

"(3) at the time of privatization, such stock shall convert to voting stock.

"(c) EVALUATION AND RECOMMENDATION.—The plan shall evaluate the relative merits of the alternatives

considered and the estimated return on the Government's investment in the Corporation achievable through each alternative. The plan shall include the Corporation's recommendation on its preferred means of privatization.

"(d) TRANSMITTAL.—The Corporation shall transmit copies of the strategic plan for privatization to the President and Congress upon completion.

"SEC. 1502. PRIVATIZATION. [42 U.S.C. § 2297d-1.]

"(a) IMPLEMENTATION.—Subsequent to transmitting a plan for privatization pursuant to section 1501, and subject to subsections (b) and (c), the Corporation may implement the privatization plan if the Corporation determines, in consultation with appropriate agencies of the United States, that privatization will—

"(1) result in a return to the United States at least equal to the net present value of the Corporation;

"(2) not result in the Corporation being owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government;

"(3) not be inimical to the health and safety of the public or the common defense and security; and

"(4) provide reasonable assurance that adequate enrichment capacity will remain available to meet the domestic electric utility industry.

"(b) REQUIREMENT OF PRESIDENTIAL APPROVAL.—The Corporation may not implement the privatization plan without the approval of the President.

"(c) NOTIFICATION OF CONGRESS AND GAO EVALUATION.—The Corporation shall notify the Congress of its intent to implement the privatization plan. Within 30 days of

notification, the Comptroller General shall submit a report to Congress evaluating the extent to which—

"(1) the privatization plan would result in any ongoing obligation or undue cost to the Federal Government; and

"(2) the revenues gained by the Federal Government under the privatization plan would represent at least the net present value of the Corporation.

"(d) PERIOD FOR CONGRESSIONAL REVIEW.—The Corporation may not implement the privatization plan less than 60 days after notification of the Congress.

"(e) DEPOSIT OF PROCEEDS.—Proceeds from the sale of capital stock of the Corporation under this section shall be deposited in the general fund of the Treasury.

* * * *

2. PERTINENT PROVISIONS OF TITLE X (106 STAT. 2946 *ET SEQ.*)

## TITLE X—REMEDIAL ACTION AND URANIUM REVITALIZATION

### Subtitle A—Remedial Action at Active Processing Sites

SEC. 1001. REMEDIAL ACTION PROGRAM. [42 U.S.C. § 2296a.]

(a) IN GENERAL.—Except as provided in subsection (b), the costs of decontamination, decommissioning, reclamation, and other remedial action at an active uranium or thorium processing site shall be borne by persons licensed under section 62 or 81 of the Atomic Energy Act of 1954 (42 U.S.C. 2091, 2111) for any activity at such site which results or has resulted in the production of byproduct material.

(b) REIMBURSEMENT.—

(1) IN GENERAL.—The Secretary of Energy shall, subject to paragraph (2), reimburse at least annually a licensee described in subsection (a) for such portion of the costs described in such subsection as are—

(A) determined by the Secretary to be attributable to byproduct material generated as an incident of sales to the United States; and

(B) either—

(i) incurred by such licensee not later than December 31, 2002; or

(ii) placed in escrow not later than December 31, 2002, in accordance with a plan for subsequent decontamination, decommissioning, reclamation, and other remedial action approved by the Secretary.

(2) AMOUNT.—

(A) TO INDIVIDUAL ACTIVE SITE URANIUM LICENSEES.—The amount of reimbursement paid to any licensee under paragraph (1) shall be determined by the Secretary in accordance with regulations issued pursuant to section 1002 and, for uranium mill tailings only, shall not exceed an amount equal to $5.50 multiplied by the dry short tons of byproduct material located on the date of the enactment of this Act at the site of the activities of such licensee described in subsection (a), and generated as an incident of sales to the United States.

(B) TO ALL ACTIVE SITE URANIUM LICENSEES.—Payments made under paragraph (1) to active site uranium licensees shall not in the aggregate exceed $270,000,000.

(C) TO THORIUM LICENSEES.—Payments made under paragraph (1) to the licensee of the active thorium site shall not exceed $40,000,000, and may only be made for off-site disposal.

(D) INFLATION ESCALATION INDEX.—The amounts in subparagraphs (A), (B), and (C) of this paragraph shall be increased annually based upon an inflation index. The Secretary shall determine the appropriate index to apply.

(E) ADDITIONAL REIMBURSEMENT.—

(i) DETERMINATION OF EXCESS.—The Secretary shall determine as of July 31, 2005, whether the amount authorized to be appropriated pursuant to section 1003, when considered with the $5.50 per dry short ton limit on reimbursement, exceeds the amount reimbursable to the licensees under subsection (b)(2).

(ii) IN THE EVENT OF EXCESS.—If the Secretary determines under clause (i) that there is an excess, the Secretary may allow reimbursement in excess of $5.50 per dry short ton on a prorated basis at such sites where the costs reimbursable under subsection (b)(1) exceed the $5.50 per dry short ton limitation described in paragraph (2) of such subsection.

(3) BYPRODUCT LOCATION.—Notwithstanding the requirement of paragraph (2)(A) that byproduct material be located at the site on the date of the enactment of this Act, byproduct material moved from the site of the Edgemont Mill to a disposal site as the result of the decontamination, decommissioning, reclamation, and other remedial action of such mill shall be eligible for reimbursement to the extent eligible under paragraph (1).

SEC. 1002. REGULATIONS. [42 U.S.C. § 2296a-1.]

Within 180 days of the date of the enactment of this Act, the Secretary shall issue regulations governing reimbursement under section 1001. An active uranium or thorium processing site owner shall apply for reimbursement hereunder by submitting a request for the amount of reimbursement, together with reasonable documentation in support thereof, to the Secretary. Any such request for reimbursement, supported by reasonable documentation, shall be approved by the Secretary and reimbursement therefor shall be made in a timely manner subject only to the limitations of section 1001.

SEC. 1003. AUTHORIZATION OF APPROPRIATIONS. [42 U.S.C. § 2296a-2.]

(a) IN GENERAL.—There is authorized to be appropriated $310,000,000 to carry out this subtitle. The aggregate amount authorized in the preceding sentence shall be increased annually as provided in section 1001, based upon an inflation index to be determined by the Secretary.

(b) SOURCE.—Funds described in subsection (a) shall be provided from the Fund established under section 1801 of the Atomic Energy Act of 1954.

* * * *

3. PERTINENT PROVISIONS OF TITLE XI (106 STAT. 2951 *ET SEQ.*)

TITLE XI—URANIUM ENRICHMENT HEALTH, SAFETY, AND ENVIRONMENT ISSUES

SEC. 1101. URANIUM ENRICHMENT HEALTH, SAFETY, AND ENVIRONMENT ISSUES.

The Atomic Energy Act of 1954 (42 U.S.C. 2011, *et seq.*), as amended by title IX of this Act, is further amended by adding at the end of title II the following:

* * * *

"CHAPTER 28—DECONTAMINATION AND DECOMMISSIONING

"SEC. 1801. URANIUM ENRICHMENT DECONTAMINATION AND DECOMMISSIONING FUND. [42 U.S.C. § 2297g.]

"(a) ESTABLISHMENT.—There is established in the Treasury of the United States an account to be known as the Uranium Enrichment Decontamination and Decommissioning Fund (referred to in this chapter as the 'Fund'). The Fund, and any amounts deposited in it, including any interest earned thereon, shall be available to the Secretary subject to appropriations for the exclusive purpose of carrying out this chapter.

"(b) ADMINISTRATION.—

"(1) IN GENERAL.—The Secretary of the Treasury shall hold the Fund and, after consultation with the Secretary, annually report to the Congress on the financial condition and operations of the Fund during the preceding fiscal year.

"(2) INVESTMENTS.—The Secretary of the Treasury shall invest amounts contained within the Fund in obligations of the United States—

"(A) having maturities determined by the Secretary of the Treasury to be appropriate for what the Department determines to be the needs of the Fund; and

"(B) bearing interest at rates determined to be appropriate by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United

States with remaining periods to maturity comparable to these obligations.

"SEC. 1802. DEPOSITS. [42 U.S.C. § 2297g-1.]

"(a) AMOUNT.—The Fund shall consist of deposits in the amount of $480,000,000 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

"(b) SOURCE.—Deposits described in subsection (a) shall be from the following sources:

"(1) Sums collected pursuant to subsection (c).

"(2) Appropriations made pursuant to subsection (d).

"(c) SPECIAL ASSESSMENT.—The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before the date of the enactment of this title, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or produced for defense purposes) before the date of the enactment of this title. For purposes of this subsection—

"(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

"(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

"(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Fund, for the period encompassing 15 years after the date of the enactment of this title, such sums as are necessary to ensure that the amount required under subsection (a) is deposited for each fiscal year.

"(e) TERMINATION OF ASSESSMENTS.—The collection of amounts under subsection (c) shall cease after the earlier of—

"(1) 15 years after the date of the enactment of this title; or

"(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

"(f) CONTINUATION OF DEPOSITS.—Except as provided in subsection (e), deposits shall continue to be made into the Fund under subsection (d) for the period specified in such subsection.

"(g) TREATMENT OF ASSESSMENT.—Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

"SEC. 1803. DEPARTMENT FACILITIES. [42 U.S.C. § 2297g-2.]

* * * *

"(b) PAYMENT OF DECONTAMINATION AND DECOMMISSIONING COSTS.—The costs of all decontamination and decommissioning activities of the Department shall be paid from the Fund until such time as the Secretary certifies and the Congress concurs, by law, that such activities are complete.

"(c) PAYMENT OF REMEDIAL ACTION COSTS.—The annual cost of remedial action at the Department's gaseous diffusion facilities shall be paid from the Fund to the extent the amount available in the Fund is sufficient. To the extent the amount in the Fund is insufficient, the Department shall be responsible for the cost of remedial action. No provision of this title may be construed to relieve in any way the responsibility or liability of the Department for remedial action under applicable Federal and State laws and regulations.

## B. CURRENT STATE OF CERTAIN PROVISIONS OF TITLES X AND XI OF EPACT

### (CURRENT TO JANUARY 1, 2002)

### 1. TITLE X, SUBTITLE A, SECTION 1003:

SEC. 1003. AUTHORIZATION OF APPROPRIATIONS. [42 U.S.C. § 2296a-2.]

(a) IN GENERAL

There is authorized to be appropriated $490,000,000 to carry out this part. The aggregate amount authorized in the preceding sentence shall be increased annually as provided in section 2296a of this title, based upon an inflation index to be determined by the Secretary.

(b) SOURCE

Funds described in subsection (a) of this section shall be provided from the Fund established under section 2297g of this title.

## 2. TITLE XI, § 1101, REVISED VERSION OF SECTION 1802 OF THE ATOMIC ENERGY ACT OF 1954

SEC. 1802. DEPOSITS. [42 U.S.C. § 2297g-1.]

(a) AMOUNT

The Fund shall consist of deposits in the amount of $488,333,333 per fiscal year (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) as provided in this section.

(b) SOURCE

Deposits described in subsection (a) of this section shall be from the following sources:

(1) Sums collected pursuant to subsection (c) of this section.

(2) Appropriations made pursuant to subsection (d) of this section.

(c) SPECIAL ASSESSMENT

The Secretary shall collect a special assessment from domestic utilities. The total amount collected for a fiscal year shall not exceed $150,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor). The amount collected from each utility pursuant to this subsection for a fiscal year shall be in the same ratio to the amount required under subsection (a) of this section to be deposited for such fiscal year as the total amount of separative work units such utility has purchased from the Department of Energy for the purpose of commercial electricity generation, before October 24, 1992, bears to the total amount of separative work units purchased from the Department of Energy for all purposes (including units purchased or

produced for defense purposes) before October 24, 1992. For purposes of this subsection—

(1) a utility shall be considered to have purchased a separative work unit from the Department if such separative work unit was produced by the Department, but purchased by the utility from another source; and

(2) a utility shall not be considered to have purchased a separative work unit from the Department if such separative work unit was purchased by the utility, but sold to another source.

(d) AUTHORIZATION OF APPROPRIATIONS

There are authorized to be appropriated to the Fund, for the period encompassing 15 years after October 24, 1992, such sums as are necessary to ensure that the amount required under subsection (a) of this section is deposited for each fiscal year.

(e) TERMINATION OF ASSESSMENTS

The collection of amounts under subsection (c) of this section shall cease after the earlier of—

(1) 15 years after October 24, 1992; or

(2) the collection of $2,250,000,000 (to be annually adjusted for inflation using the Consumer Price Index for all-urban consumers published by the Department of Labor) under such subsection.

(f) CONTINUATION OF DEPOSITS

Except as provided in subsection (e) of this section, deposits shall continue to be made into the Fund under subsection (d) of this section for the period specified in such subsection.

(g) TREATMENT OF ASSESSMENT

Any special assessment levied under this section on domestic utilities for the decontamination and decommissioning of the Department's gaseous diffusion enrichment facilities shall be deemed a necessary and reasonable current cost of fuel and shall be fully recoverable in rates in all jurisdictions in the same manner as the utility's other fuel cost.

C. RELEVANT PROVISIONS OF USEC PRIVATIZATION ACT, PUB. L. NO. 104-134, TITLE III, SUBCHAPTER A, §§ 3101 *ET SEQ.*

(CURRENT TO JANUARY 1, 2002)

1. TITLE III, SUBCHAPTER A, SECTION 3107:

SEC. 3107. LEASING OF GASEOUS DIFFUSION FACILITIES. [42 U.S.C. § 2297h-5.]

* * * *

(d) DOE RESPONSIBILITY FOR PREEXISTING CONDITIONS

The payment of any costs of decontamination and decommissioning, response actions, or corrective actions with respect to conditions existing before July 1, 1993, at the gaseous diffusion plants shall remain the sole responsibility of the Secretary.

2. TITLE III, SUBCHAPTER A, SECTION 3109:

SEC. 3109. LIABILITIES. [42 U.S.C. § 2297h-7].

(a) LIABILITY OF THE UNITED STATES

(1) Except as otherwise provided in this subchapter, all liabilities arising out of the operation of the uranium enrichment enterprise before July 1, 1993, shall remain the direct liabilities of the Secretary.

(2) Except as provided in subsection (a)(3) of this section or otherwise provided in a memorandum of agreement entered into by the Corporation and the Office of Management and Budget prior to the

privatization date, all liabilities arising out of the operation of the Corporation between July 1, 1993, and the privatization date shall remain the direct liabilities of the United States.

(3) All liabilities arising out of the disposal of depleted uranium generated by the Corporation between July 1, 1993, and the privatization date shall become the direct liabilities of the Secretary.

(4) Any stated or implied consent for the United States, or any agent or officer of the United States, to be sued by any person for any legal, equitable, or other relief with respect to any claim arising from any action taken by any agent or officer of the United States in connection with the privatization of the Corporation is hereby withdrawn.

(5) To the extent that any claim against the United States under this section is of the type otherwise required by Federal statute or regulation to be presented to a Federal agency or official for adjudication or review, such claim shall be presented to the Department of Energy in accordance with procedures to be established by the Secretary. Nothing in this paragraph shall be construed to impose on the Department of Energy liability to pay any claim presented pursuant to this paragraph.

(6) The Attorney General shall represent the United States in any action seeking to impose liability under this subsection.

(b) LIABILITY OF THE CORPORATION

Notwithstanding any provision of any agreement to which the Corporation is a party, the Corporation shall not be considered in breach, default, or violation of any agreement because of the transfer of such agreement to the private

corporation under section 3108 or any other action the Corporation is required to take under this subchapter.

(c) LIABILITY OF THE PRIVATE CORPORATION

Except as provided in this subchapter, the private corporation shall be liable for any liabilities arising out of its operations after the privatization date.

(d) LIABILITY OF OFFICERS AND DIRECTORS

(1) No officer, director, employee, or agent of the Corporation shall be liable in any civil proceeding to any party in connection with any action taken in connection with the privatization if, with respect to the subject matter of the action, suit, or proceeding, such person was acting within the scope of his employment.

(2) This subsection shall not apply to claims arising under the Securities Act of 1933 (15 U.S.C. 77a. et seq.), the Securities Exchange Act of 1934 (15 U.S.C. 78a, et seq.), or under the Constitution or laws of any State, territory, or possession of the United States relating to transactions in securities.

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Nos. 01-1020, 01-1155, 01-1398 and 01-1411

# In the Supreme Court of the United States

SACRAMENTO MUNICIPAL UTILITY DISTRICT,
PETITIONER

*v.*

UNITED STATES OF AMERICA

MAINE YANKEE ATOMIC POWER COMPANY,
PETITIONER

*v.*

UNITED STATES OF AMERICA

OMAHA PUBLIC POWER DISTRICT, PETITIONER

*v.*

UNITED STATES OF AMERICA

COMMONWEALTH EDISON COMPANY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

In order to provide some of the funds necessary to decontaminate the Department of Energy's uranium enrichment facilities, Congress imposed a special assessment on those domestic nuclear utilities that had purchased, either from the Department of Energy directly or in the secondary market, uranium that had been enriched at those facilities. See 42 U.S.C. 2297; 42 U.S.C. 2297g-1 (1994 & Supp. V 1999). The questions presented are:

1. Whether the special statutory decontamination assessment constitutes an unlawful breach of the contracts for uranium enrichment services between petitioners and the Department of Energy.

2. Whether the special decontamination assessment constitutes an impermissible taking of petitioners' property without just compensation.

3. Whether the special decontamination assessment is unconstitutionally retroactive, in violation of petitioners' substantive due process rights.

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

## OPINIONS BELOW

The decision of the en banc court of appeals in *Commonwealth Edison* (SMUD Pet. App. 17a-68a; Com Ed Pet.

App. 1a-52a)[1] is reported at 271 F.3d 1327. The decision of the Court of Federal Claims in *Commonwealth Edison* (Com Ed Pet. App. 85a-120a) is reported at 46 Fed. Cl. 29.

The consolidated decision of the panel of the court of appeals in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* (SMUD Pet. App. 1a-16a) is reported at 271 F.3d 1357. The decision of the Court of Federal Claims in *Sacramento Municipal* (SMUD Pet. App. 69a-91a) is reported at 44 Fed. Cl. 395. The decision of the Court of Federal Claims in *Maine Yankee* (MYAP Pet. App. 17a-39a) is reported at 44 Fed. Cl. 372. The decision of the Court of Federal Claims in *Omaha Power* (OPPD Pet. App. 17a-39a) is reported at 44 Fed. Cl. 383.

## JURISDICTION

The judgment of the en banc court of appeals in *Commonwealth Edison* was entered on November 20, 2001. On February 12, 2002, the Chief Justice extended the time within which to file a petition for a writ of certiorari in that case to and including March 20, 2002, and the petition was filed on that date.

The judgment of the panel of the court of appeals in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* was entered on November 20, 2001. Sacramento Municipal Utility District's petition for a writ of certiorari in No. 01-1020 was filed on January 10, 2002. Maine Yankee Atomic Power Company's petition in No. 01-1155 was filed on February 8, 2002. On February 13, 2002, the Chief Justice extended the time for filing a certiorari petition for Omaha Public Power District to and including March 20, 2002, and the petition in No. 01-1398 was filed on that date.

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[1] References in this brief to "SMUD Pet." are to the petition in No. 01-1020; to "MYAP Pet." are to the petition in No. 01-1155; to "OPPD Pet." are to the petition in No. 01-1398; and to "Com Ed Pet." are to the petition in No. 01-1411.

The jurisdiction of this Court in each case is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1992, Congress enacted the Energy Policy Act (EPACT), Pub. L. No. 102-486, 106 Stat. 2276, which was intended to establish a "comprehensive national energy policy" addressing, among other things, "solutions to our nuclear waste and uranium enrichment problems." H.R. Rep. No. 474, 102d Cong., 2d Sess. Pt. 1, at 132 (1992). Among those problems was contamination at the Department of Energy's (DOE's) uranium enrichment facilities. The government had conducted uranium enrichment at those facilities since the 1940s, and since the 1960s had offered commercial uranium enrichment services to utility companies for use in power generation. See SMUD Pet. App. 20a.[2]

Typically, DOE offered uranium enrichment to utilities under an arrangement by which the purchasers furnished low-grade uranium to the Department, DOE processed the uranium, and DOE then returned the enriched uranium to the utilities. The enrichment services were measured in terms of "separative work units" (SWUs). Utilities were typically charged the product of the number of SWUs they received, multiplied by the unit price in the contract. The unit pricing varied somewhat from contract to contract, but generally the unit price was established by reference to the price in effect at the time the service was rendered, and in some cases was also capped by contract at a maximum price. SMUD Pet. App. 20a-21a.

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[2] Before the establishment of the Department of Energy, the government's uranium enrichment facilities were operated by the Atomic Energy Commission and by the Energy Research and Development Administration. See SMUD Pet. App. 20a. For simplicity, we refer in this brief to the governmental entity that conducted uranium enrichment as DOE or the Department.

Before enacting EPACT, Congress extensively considered numerous options to finance the decontamination and decommissioning of uranium enrichment facilities. Congress considered past use of the plants, the causes of the contamination, and estimates of clean-up costs. By 1992, estimates of the cost of decontamination had risen to more than $20 billion. During hearings, industry representatives, who participated actively in the framing of EPACT, acknowledged that the industry had benefited from the uranium enrichment services, and expressed the industry's willingness to pay a fair share of the cost of decontaminating the enrichment facilities. They urged Congress to adopt a compromise that capped utilities' contribution at $2.5 billion. See *Comprehensive National Energy Policy Act: Hearings on H.R. 776 Before the House Comm. on Ways and Means*, 102d Cong., 2d Sess. 171, 178-182 (1992); SMUD Pet. App. 26a-30a (reviewing legislative framing of EPACT).

After debating options and weighing facts surrounding the use and contamination of the plants, Congress concluded that it was equitable for domestic utilities that had benefited from DOE's uranium enrichment services to contribute a portion of the cost of decontaminating the facilities where that enrichment was conducted. See H.R. Rep. No. 474, *supra*, Pt. 8, at 77-78; 138 Cong. Rec. 32,073 (1992) (remarks of Rep. Sharp). Congress established the Uranium Enrichment Decontamination and Decommissioning Fund (Fund) to accumulate and disburse the funds necessary to decontaminate those facilities. See 42 U.S.C. 2297g; 42 U.S.C. 2297g-1 (1994 & Supp. V 1999). Congress provided that the federal government would absorb the majority of the decontamination costs through annual appropriations to the Fund totaling $330 million (adjusted annually for inflation), or 68% of the total amount to be deposited into the Fund over 15 years. See 42 U.S.C. 2297g-1(b)(2), (c) and (d); 42 U.S.C. 2297g-1(a) (1994 & Supp. V 1999).

The remaining 32% (not to exceed $2.25 billion over 15 years) of the Fund's financial base is collected in annual installments (not to exceed $150 million per year, adjusted annually for inflation) from domestic utilities that obtained government-enriched uranium for the purpose of generating electricity. See 42 U.S.C. 2297g-1(c). Whether a utility is required to contribute to the Fund turns not on whether the utility had entered into a contract to purchase uranium from DOE, but whether the utility actually obtained the enriched uranium, and thus had benefited from DOE's enrichment services. In particular, a utility that purchased enriched uranium from DOE, but resold that uranium to another utility on the secondary market is not responsible to contribute to the Fund for the amount of uranium that it resold and did not use, whereas a utility that purchased uranium from another utility but not from DOE for its own use in power generation is responsible for contributing to the Fund in an amount proportionate to the amount of uranium that it used. See 42 U.S.C. 2297g-1(c); see also SMUD Pet. App. 25a. Utilities that are required to pay an assessment to the Fund may in turn treat that assessment as a "necessary and reasonable current cost of fuel" that is "fully recoverable in rates * * * in the same manner as the utility's other fuel cost." 42 U.S.C. 2297g-1(g).

2. After the enactment of EPACT, petitioners, as well as several other utility companies, each filed suit in the Court of Federal Claims challenging the EPACT assessments on constitutional and contract-law grounds. In 1997, a panel of the Federal Circuit, in a separate case, rejected the utilities' principal arguments based on contract law. *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 951 (1998). The *Yankee Atomic* panel first noted that the disputes did not even "appear to be [cases] involving a breach of contract[,]" because, "[t]ypically, a contract breach occurs while the contract is

being performed, whereas the contracts in the present case have been fully performed by both parties." *Id.* at 1573 n.2. The court also concluded, however, that the government was not liable for breach of contract in any event based on EPACT because of the sovereign-acts and unmistakability doctrines. *Id.* at 1574. In so concluding, the court carefully examined and applied this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

Applying the sovereign-acts doctrine, the *Yankee Atomic* court ruled that passage of the EPACT assessment provision did not constitute a breach of the government's contract with the utilities because that provision was enacted not "for the purpose of retroactively increasing the price of its earlier contracts with [the utilities]," but rather "for the purpose of solving the problem of decontamination and decommissioning of uranium enrichment facilities (*i.e.*, the legislation was passed for the benefit of the public)." 112 F.3d at 1575. The court stressed that the EPACT assessments fall not on the entities that contracted with DOE for enrichment services, but rather on the utilities that eventually used the enriched uranium for power generation, even if they purchased that uranium in the secondary market. *Id.* at 1574-1575.

The *Yankee Atomic* court further concluded that, under the unmistakability doctrine (under which "[a] contract with a sovereign government will not be read to include an unstated term exempting the other contracting party from the application of a subsequent sovereign act," EPACT also furnished no basis for government liability to the utilities. See 112 F.3d at 1578 (quoting *Winstar*, 518 U.S. at 878 (opinion of Souter, J.)). The court noted that "application of the unmistakability doctrine turns on whether enforcement of the contractual obligation would effectively block the exercise of a sovereign power of the Government," and that the utilities' contracts with the government, although typi-

cally fixed-price contracts, contained no promise that "unmistakably precluded the Government from subsequently exercising its sovereign power to assess a tax." *Id.* at 1579.[3] The utility sought certiorari in *Yankee Atomic*, arguing that EPACT breached its contract with DOE, but this Court denied review, 524 U.S. 951 (1998).

3. Thereafter, these cases proceeded in the Court of Federal Claims. Each case was dismissed by that court for failure to state a claim. See SMUD Pet. App. 69a-91a; MYAP Pet. App. 17a-39a; OPPD Pet. App. 17a-39a; Com Ed Pet. App. 85a-124a.

Each petitioner appealed to the Federal Circuit. Oral arguments in *Sacramento Municipal*, *Maine Yankee*, and *Omaha Power* were separately conducted on the same day before the same panel of the Federal Circuit. The separate and later appeal in *Commonwealth Edison* proceeded before a different panel of the Federal Circuit; after that panel argument, the Federal Circuit *sua sponte* ordered that *Commonwealth Edison* be heard en banc. SMUD Pet. App. 17a.

4. The en banc court affirmed the dismissal in *Commonwealth Edison*. SMUD Pet. App. 17a-68a. On the basis of the en banc court's decision in *Commonwealth Edison*, the panel hearing the appeals in the other three cases also affirmed the dismissal of those cases. *Id.* at 1a-16a.

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[3] Judge Mayer dissented from the panel's decision in *Yankee Atomic*, but he would not have ruled that EPACT constituted a breach of contract. To the contrary, he agreed with the panel majority that "[o]nce a contract is completed, the contractual relationship ends and there is no privity between the parties," and thus the utilities "cannot prevail on [the] claim that the government breached the contracts at issue years after they were finished." 112 F.3d at 1582; see also *id.* at 1584 ("But this is not a breach of contract case."). Rather, Judge Mayer argued that the EPACT assessments contravened substantive due process. See *id.* at 1585.

a. The en banc court first rejected the utilities' argument that the EPACT assessments constitute a taking of their property without just compensation. The court noted that, in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), five Justices (Justice Kennedy concurring in the judgment, and four dissenting Justices) concluded that "regulatory actions requiring the payment of money are not takings" (SMUD Pet. App. 36a)—a result in accord with the Federal Circuit's own pre-*Eastern Enterprises* precedent (*id.* at 36a-37a) as well as decisions of other circuits rendered after *Eastern Enterprises* (*id.* at 36a n.10). The court thus concluded that, "while a taking may occur when a specific fund of money is involved, the mere imposition of an obligation to pay money, as here, does not give rise to a claim under the Takings Clause of the Fifth Amendment." *Id.* at 37a.

b. The court also rejected the utilities' breach of contract claims, in reliance on its previous decision in *Yankee Atomic*, *supra*. As in *Yankee Atomic*, the court ruled here that "the imposition of the special assessments [under EPACT] was a lawful exercise of Congress's taxing power under the sovereign acts doctrine," and that DOE's contracts with the utilities "did not include an unmistakable promise that precluded the Government from later imposing an assessment upon all domestic utilities that employed the DOE's uranium enrichment services." SMUD Pet. App. 38a.

c. Finally, the court addressed at length and rejected the argument that the EPACT assessments violate substantive due process. SMUD Pet. App. 39a-67a. The court initially observed that, although the EPACT assessments are retroactive, that point by itself does not render them unconstitutional, for, as this Court has made clear, due process is satisfied "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." *Id.* at 40a (citation omitted). The court found that standard satisfied in the case of EPACT, because the

assessments are based on "a congressional determination to impose liability on companies that received a benefit [the uranium enrichment services], the production of which benefit contributed to a societal problem." *Id.* at 43a.

Summarizing this Court's decisions (including *Eastern Enterprises*), the court concluded that retroactive obligations to pay money satisfy substantive due process as long as "(1) Congress reasonably concluded that the party subjected to retroactive obligations benefited from activity that contributed to a societal problem, and liability is not disproportionately imposed on that party; and (2) the imposition of retroactive liability would not be contrary to that party's reasonable expectations." SMUD Pet. App. 47a. The court found the first condition "easily" satisfied, as the utilities "certainly benefited from the government's provision of enrichment services." *Ibid.* As the court noted, the utilities "could hardly have operated nuclear reactors without the benefit of uranium enrichment services from the United States government or some other approved source." *Id.* at 48a. Moreover, the processing of uranium for the utilities contributed to a societal problem by contributing "to increased costs associated with" decontamination. *Ibid.* Nor, the court ruled, were the remediation costs imposed on the utilities severely disproportionate to the benefit they received from the enrichment services; EPACT made the utilities responsible for only a third of those costs (and each utility was assessed only for the proportion of enriched uranium that it actually used), even though Congress received evidence that enriched uranium production at the DOE facilities had been divided equally between the governmental and commercial sectors. *Id.* at 49a.

The court further concluded that the EPACT assessments do not violate any reasonable expectation on the part of the utilities that, as a result of their contracts with DOE, they were entitled to immunity from any future liability for the

cost of decontamination of the DOE facilities. SMUD Pet. App. 50a-67a. The court observed that the utilities operated in a highly regulated industry where it was reasonable to "expect liability for remediation costs" (*id.* at 52a), and that the utilities were fully "aware of the hazardous nature of the materials" and that there would be a need to decontaminate the DOE facilities (*id.* at 53a).

The court also stressed that the regulatory environment at the time that utilities submitted uranium to DOE for processing placed the utilities on notice of the possible imposition of retroactive remediation liability. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, made clear that a party that arranges for the treatment or disposal of a hazardous substance may be liable for environmental damage caused by that substance, even if that party itself did not perform that treatment or disposal. See SMUD Pet. App. 56a-57a. CERCLA, in turn, is consistent with principles of common law nuisance liability and strict liability for handling of ultrahazardous materials, *id.* at 60a-62a, especially the principles set forth in the Restatement (Second) of Torts § 472b (1965), which made clear that "those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing." SMUD Pet. App. 61a. Thus, the court concluded, the utilities "could not have reasonably expected that Congress would not enact legislation imposing remediation costs on the utilities submitting uranium for processing." *Id.* at 62a.

## ARGUMENT

The court of appeals correctly rejected petitioners' contract-law and constitutional challenges to the special decontamination assessments imposed by EPACT. That decision also does not conflict with any decision of this Court

or any other court of appeals. Further review is therefore not warranted.

1. Petitioners renew the argument rejected by the Federal Circuit in *Yankee Atomic*, *supra*, that the EPACT assessments breached their uranium enrichment contracts with DOE by retroactively increasing the price of enrichment services. This Court denied review of the same contention in *Yankee Atomic*, see pp. 5-7, *supra*, and there is no basis in this case for a different result. Moreover, the lower courts properly rejected that contract claim.

a. First, as all members of the *Yankee Atomic* panel observed, no claim for breach of contract may be brought based on contracts that have already been fully performed. See 112 F.3d at 1573 n.2; *id.* at 1582 (Mayer, J., dissenting); see also *John J. Kirlin, Inc.* v. *United States*, 827 F.2d 1538, 1541 (Fed. Cir. 1987); *Mulholland* v. *United States*, 361 F.2d 237, 239-240 (Ct. Cl. 1966). Petitioners' complaints allege that, with the exception of one outstanding contract between DOE and Commonwealth Edison, the contractual relation between petitioners and the government had already terminated.[4]

Because (with the one exception) the contractual relations between the utilities and the government terminated before these actions were brought, this case does not present an appropriate occasion for the Court to examine further the sovereign-acts and unmistakability doctrines. The bulk of petitioners' contract claims could have been rejected without recourse to those doctrines, which are defenses available to the government against attempts to require the government to perform its contractual obligations, or to recover for the government's alleged breach of contractual obligations. See

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[4] See SMUD C.A. App. 24 (¶ 1); MYAP C.A. App. 35 (¶ 47), 36 (¶¶ 50-51); OPPD C.A. App. 16 (¶ 44); Com Ed C.A. App. 521 (¶ 13), 534 (¶ 45), 535 (¶ 49).

*Winstar*, 518 U.S. at 870-871 (opinion of Souter, J.); *id.* at 920-921 (Scalia, J., concurring in the judgment).

For the same reason, there is no merit to petitioner Omaha Power's argument (OPPD Pet. 21-22) that the decision below conflicts with the courts' application of the sovereign-acts doctrine in *Kimberly Associates* v. *United States*, 261 F.3d 864 (9th Cir. 2001), and *RTC* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994). In each of those decisions, the court made clear that the sovereign-acts doctrine "operates to insulate the government from liability for certain inabilities to perform contractual obligations." See *RTC*, 25 F.3d at 1501; see also *Kimberly Assocs.*, 261 F.3d at 870 (characterizing statute under consideration as "a partial repudiation by Congress of its contractual obligation to perform"). Here, however, there is no question of the government's failure to perform under its contracts with petitioners; DOE has already performed its obligations to provide enrichment services.

b. In any event, the court of appeals' application of the sovereign-acts and unmistakability doctrines was correct. The EPACT special assessment legislation is a "sovereign act." The assessments fall on the utilities that actually used the enriched uranium and thereby benefited from DOE's enrichment services, not the entities that directly purchased the uranium from DOE. Thus, EPACT cannot be viewed as a retroactive price increase of the contracts between DOE and the purchasing utilities. Rather, it is legislation designed to spread the costs of decontamination and decommissioning among the utilities that benefited from the program that caused those problems. See SMUD Pet. App. 61a; *Yankee Atomic*, 112 F.3d at 1580-1581.

Furthermore, because petitioners seek damages in the entire amount of the assessments that they are required to pay under EPACT, they effectively seek an exemption from, or an injunction against, the operation of EPACT as applied

to them. Petitioners must therefore overcome the unmistakability doctrine in its strongest form. See *Winstar*, 518 U.S. at 881-882 (opinion of Souter, J.); *id.* at 916-917 (Breyer, J., concurring); *id.* at 921 (Scalia, J., concurring in the judgment). As the Federal Circuit explained in *Yankee Atomic*, the contracts simply did not provide that the government would forego any assessments in the future on the nuclear power industry to address the cost of decontamination. See 112 F.3d at 1569. The contracts were therefore subject to subsequent legislation passed by Congress. See *Bowen* v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 52 (1986).

Nor did the government agree to indemnify the utilities against the costs of regulatory changes or legislative enactments. In *Winstar*, by contrast, this Court ruled that the United States, through guarantee clauses in contracts, had undertaken to assume the risk of, and to indemnify the acquiring thrifts for, future changes in regulatory policy. See 518 U.S. at 868-869, 871, 881-883 (opinion of Souter, J.); *id.* at 911, 918 (Breyer, J., concurring); cf. *id.* at 919-920, 923 (Scalia, J., concurring in the judgment). No such guarantee clauses existed in petitioners' contracts with DOE.

2. a. Petitioners argue that the financial impact of the EPACT assessments on them constitutes a taking of their property without just compensation. Petitioners' taking claim, however, must fail at threshold, for as five Justices of this Court made clear in *Eastern Enterprises*, a mere obligation to pay an undifferentiated amount of money, not drawn from a specific identifiable fund, is not properly analyzed as a taking at all. See *Eastern Enterprises*, 524 U.S. at 539-547 (Kennedy, J., concurring in the judgment and dissenting in part); *id.* at 554-557 (Breyer, J., dissenting). That point follows from the fact that, "[a]s its language indicates, * * * [the Just Compensation Clause] does not prohibit the taking of private property, but instead places a

condition on the exercise of that power." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987).[5]

The concern of the Just Compensation Clause is therefore not in *preventing* government action, but rather ensuring that compensation is paid when the government appropriates private property interests to serve the public good. *First English*, 482 U.S. at 314. Petitioners, however, challenge the constitutional validity of Congress's decision to enact the EPACT special assessments. To make a taking claim, petitioners would have to raise the highly contrived contention that Congress had impermissibly failed to offer them monetary compensation in the precise amount of the special assessment that Congress had ordered them to pay. The Court rejected a very similar contention in *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989), where it concluded that the government's imposition of a service fee for use of services in the U.S.-Iran Claims Tribunal, in the form of a percentage deduction from monetary awards made by the

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[5] The taking issue in this case is not distinguishable from *Eastern Enterprises* (in which five Justices found a taking analysis inapplicable) on the basis that *Eastern Enterprises* involved an obligation that one private party pay money to another private party, whereas this case involves an obligation to pay money to the government. Justice Kennedy expressly rejected the relevance of that point in *Eastern Enterprises*: "The circumstance that the statute does not take money for the Government but instead makes it payable to third persons is not a factor I rely upon to show the lack of a taking." 524 U.S. at 543 (Kennedy, J., concurring in the judgment and dissenting in part). The four other Justices who agreed that no valid taking claim was raised in *Eastern Enterprises* did remark that the case involved an obligation to pay money to a private party. See *id.* at 555 (Breyer, J., dissenting). They also observed, however, that one of the reasons that it was wrong to conceptualize the monetary obligation in *Eastern Enterprises* as a taking was that such a characterization might well lead to the conclusion that all taxes could potentially be considered takings. See *id.* at 556 (Breyer, J., dissenting).

Tribunal, was not a taking of property that required just compensation. As the Court explained:

> It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible. * * * If the deduction in this case were a physical occupation requiring just compensation, so would be any fee for services, including a filing fee that must be paid in advance.

*Id.* at 62 n.9. The Court in *Sperry* also distinguished (*id.* at 62) cases such as *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164-165 (1980), where the Court applied a taking analysis to interest generated from a specific *res*, a separately identifiable fund of money.[6]

Perhaps recognizing the force of that point, petitioner Commonwealth Edison stretches to find a specific property interest that may have been taken, suggesting (Com Ed Pet. 13) that the requisite "property" is the "stream of income" supposedly created by the passing on of the cost of the assessments to consumers of electrical power. EPACT, however, does not require the payment of the assessments out of any such "stream of income" or indeed from any particular identifiable source or fund of money. Rather, the utilities are generally liable for EPACT assessments without regard to whether the assessments are passed on to

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[6] Petitioner MYAP argues (MYAP Pet. 21) that cases such as *Webb's* are not distinguishable from this case because *Webb's* involved a taking of interest earned on a specific fund of money, not the fund itself. The Court made clear in *Webb's*, however, that it decided that case based on the common law rule that "any interest * * * follows the principal" and becomes part of the fund itself. See *Webb's*, 449 U.S. at 162; see also *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 165-168 (1998) (using same rule to analyze alleged taking of interest earned on attorney trust accounts).

consumers and without reference to the source of the funds used to pay the assessments. See *Sperry*, 493 U.S. at 62 n.9.

b. Even if a taking analysis were applicable to the EPACT assessments, they would not be invalid. A taking by regulation or legislation may occur if the government goes "too far" in interfering with rights of property ownership. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). Regulatory taking claims are generally subject to the three-part analysis set forth in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104, 124 (1978), which takes into account (1) "the character of the governmental action," (2) "[t]he economic impact of the regulation on the claimant," and (3) "the extent to which the regulation has interfered with distinct investment-backed expectations." Those factors make clear that the EPACT assessments are not takings.[7]

First, the nature of the government's action is "critical" in determining whether a taking occurred. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 488 (1987). EPACT assessments are "very similar to * * * a general tax that falls proportionately on all utilities that benefited from the DOE's uranium enrichment services." *Yankee Atomic*, 112 F.3d at 1576. This Court has stressed, however, that taxes are exactly the kind of governmental action that

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[7] The EPACT assessments cannot properly be viewed as a physical appropriation or occupation of property that this Court has characterized as a per se taking. Cf. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). Even the four Justices who applied a taking analysis to the legislatively imposed monetary obligation at issue in *Eastern Enterprises* declined to characterize that liability as a per se taking. See *Eastern Enterprises*, 524 U.S. at 522, 530 (opinion of O'Connor, J.); see also *Tahoe-Sierra Preservation Council, Inc.* v. *Tahoe Reg'l Planning Agency*, No. 00-1167 (Apr. 23, 2002), slip op. 17-28 (reaffirming limited reach of per se taking analysis to physical occupations and appropriations of property).

are least likely to be considered takings: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law, and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values. *Exercises of the taxing power are one obvious example.*" *Penn Central*, 438 U.S. at 124 (emphasis added; citations omitted).

Second, the economic impact of the assessments on petitioners is proportionate to their prior experience with the uranium enrichment services that are the object of the legislation. EPACT specifically allocates liability in direct proportion to the utilities' previous use of enriched uranium. See p. 5, *supra*. In addition, EPACT moderates the impact of the assessments on petitioners by mandating that a utility "shall" be allowed to fully recover the special assessments from its ratepayers as a "necessary and reasonable current cost of fuel." 42 U.S.C. 2297g-1(g). Because the pass-through mechanism is established by federal law, state regulators are preempted from disregarding it. See, *e.g.*, *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 369-372 (1988). Thus, petitioners have a federal right to pass through the impact of the EPACT assessments to their customer base. Cf. *Eastern Enterprises*, 524 U.S. at 527, 531 (opinion of O'Connor, J.) (noting that regulated entity's ability to moderate impact of liability by passing on obligation is relevant to taking analysis, but finding no "right of reimbursement" in that case).

Finally, the assessments do not contravene any reasonable expectation on the part of petitioners that they would be immune from future governmental assessments requiring contributions to meet the costs of decontamination of the enrichment facilities. As the court of appeals explained, enriched uranium has long been known to be extremely

hazardous; it has long been understood that the enrichment process would leave a need for decontamination; and the nuclear power industry has always been strictly regulated. See SMUD Pet. App. 52a-54a. EPACT was designed "to implement solutions to our nuclear waste and uranium enrichment problems," H.R. Rep. No. 474, *supra*, Pt. 1, at 132, and a nuclear utility using enriched uranium could hardly expect to be immune from contributing to such solutions. "Those who do business in [a highly regulated field] cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 227 (1986).

Nothing in the legislation or regulations governing the nuclear power program could have created a reasonable expectation that nuclear power companies would be exempt from future assessments for decontamination of uranium enrichment plants. To the contrary, the strict regulation of the industry put them on notice that they could be liable in the future for assessments like those at issue here. And as the court of appeals also explained in *Yankee Atomic*, 112 F.3d at 1580-1581, petitioners' contracts with DOE for uranium enrichment services also created no contract-based expectation that they would be immune from sharing in the future cost of decontamination.

c. Petitioners erroneously suggest (Com Ed Pet. 16) that the decision below, finding a taking analysis inapplicable, is contrary to decisions of other circuits that have analyzed monetary obligations to the government under the regulatory taking doctrine. In *United States* v. *Hercules, Inc.*, 247 F.3d 706 (8th Cir.), cert. denied, 122 S. Ct. 665 (2001), the court expressly *declined* to address the taking claim on the ground that the extent of the challenged monetary liability was uncertain. Although the court remarked that any taking analysis would likely be "ad hoc and fact intensive," *id.* at 722

(citing *Eastern Enterprises*, 524 U.S. at 523 (opinion of O'Connor, J.)), it did not address the logically anterior question whether the liability should be analyzed as a taking at all. In *United States Fidelity & Guaranty Co.* v. *McKeithen*, 226 F.3d 412 (5th Cir. 2000), cert. denied, 532 U.S. 922 (2001), the court ruled that a retroactive adjustment to Louisiana's workers' compensation scheme was an invalid taking, but the court stressed (after considering the significance of Justice Kennedy's separate opinion in *Eastern Enterprises*) that the case before it involved the taking of "an identifiable property interest or fund," namely, a "specific fund of benefits." *Id.* at 420. That important point distinguishes that case from this one, which involves a general liability that petitioners may and must meet out of any of their assets.[8]

3. Petitioners contend that the EPACT assessment obligation violates substantive due process because of its retroactive effect. Petitioners make essentially three arguments in support of that contention. First, they argue that they had a reasonable expectation, based in their fixed-price contracts with DOE, that the costs of decontaminating the enrichment facilities would be entirely absorbed by the government. Second, they contend that the extent of the retroactivity, by itself, renders the assessments invalid. Third, they argue that they cannot be deemed responsible for the contamination because the facilities were already contaminated by the government's enrichment of uranium

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[8] In addition, the Louisiana scheme invalidated in *United States Fidelity & Guaranty* is crucially different from the EPACT assessments in that many of the workers' compensation insurance companies affected by the retroactive change in the law effectively had no way to pass on the increased assessments to any customer base in the State, for they had left the business of writing insurance in Louisiana. See 226 F.3d at 418. By contrast, petitioners have a federal right to pass on the EPACT assessments to their utility customers. See p. 17, *supra*.

for its own military needs before the government began offering commercial enrichment services to nuclear utilities. Each of those arguments is without merit.[9]

a. As this Court has made clear on numerous occasions, retroactive economic legislation enjoys a presumption of validity. See, *e.g.*, *Pension Benefit Guar. Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 729 (1984); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976). That presumption of validity is not overcome merely because the law upsets "otherwise settled expectations" or imposes new liability based on past acts. *Id.* at 16. Of course, "[i]t does not follow * * * that what Congress can legislate prospectively it can legislate retrospectively," and "[t]he retro[active] aspects of legislation * * * [also] must meet the test of due process." *Id.* at 16-17. But "[p]rovided that the retroactive application of a statute is supported by a legitimate legislative purpose

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[9] Petitioners also argue (SMUD Pet. 23-24; MYAP Pet. 17-19) that the EPACT assessments require special scrutiny under the Due Process Clause because (petitioners maintain) they operate as taxing provisions. But as this Court explained in *United States* v. *Carlton*, 512 U.S. 26 (1994), and as the court of appeals in this case observed (SMUD Pet. App. 41a), the cases on which petitioners rely, subjecting retroactive taxes to heightened scrutiny, "were decided during an era characterized by exacting review of economic legislation under an approach that has long since been discarded." *Carlton*, 512 U.S. at 34 (internal quotation marks omitted). *Carlton* made clear that the rational-basis due process test for retroactive application of taxing statutes "is the same as that generally applicable to retroactive economic legislation." *Id.* at 30. Moreover, the tax cases on which petitioners rely all involved taxes for the purposes of raising *general* revenues for the support of government. This case involves an assessment for a dedicated purpose, namely, the decontamination and decommissioning of enrichment facilities from which petitioners benefited. Thus, even if, as petitioners contend, a "wholly new tax" for the purpose of raising general revenues could not be applied retroactively, see MYAP Pet. 18, that point would not apply to an assessment, such as the EPACT assessment, that is intended and necessary to implement a specific regulatory scheme.

furthered by rational means, judgments about the wisdom of such legislation remain within the exclusive province of the legislative and executive branches." *R.A. Gray*, 467 U.S. at 729.

It was legitimate and rational for Congress to require utilities that obtained their enriched uranium from government-operated facilities to contribute to the cost of decontaminating those facilities. The substantial cost of decontamination was not anticipated at the time the government provided those enrichment services, and Congress was not precluded from acting to spread the "actual, measurable cost of [a] business" that the utilities were able to avoid in the past. *Turner Elkhorn*, 428 U.S. at 19. "[T]he costs of large, unrecognized societal problems are frequently spread among those who benefited from the source of the problem," *Yankee Atomic*, 112 F.3d at 1576 n.6, and the EPACT assessment is "the Government's way of spreading the costs of the later discovered decontamination and decommissioning problem on all utilities that benefited from the Government's service, whether or not those services were acquired by contract from the Government," *id.* at 1580.

Moreover, Congress understood that the utilities had received two substantial benefits (beyond just receiving the uranium itself) from the government's enrichment services. First, DOE was required to price the enrichment services on a cost-recovery basis; the program was not intended as a profit-making enterprise. See 42 U.S.C. 2201(v)(B)(iii) (1988). Thus, the utilities received below-market pricing for the services. Second, by obtaining the use of the government's enrichment facilities, utilities were able to avoid the even greater costs of building enrichment plants of their own and meeting their own decontamination costs. See 138 Cong. Rec. at 32,073 (remarks of Rep. Sharp); H.R. Rep. No. 474, *supra*, Pt. 1, at 144-145.

Petitioners in any event did not have a reasonable expectation that they would be immune from legislation requiring them to contribute to the cost of decontaminating the facilities from which they obtained their enriched uranium. Petitioners' contracts with DOE set a price for uranium enrichment services, but the contracts did not address future assessments for decontamination and decommissioning at all—much less purport to foreclose any future liability that might prove to be necessary to protect the public health and safety. There accordingly was no settled expectation to upset. See *Yankee Atomic*, 112 F.3d at 1575-1582; cf. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005-1006, 1008-1010 (1984).

Nor did the legislative and regulatory environment at the time the enrichment services were provided suggest that petitioners could escape liability for decontamination costs. To the contrary, as the court of appeals explained, based on its comprehensive review of the law of liability for hazardous substances (SMUD Pet. App. 54a-67a), it was entirely foreseeable, well before the enactment of EPACT, that the utilities would have to contribute to the decontamination of the enrichment facilities. First, CERCLA, which was enacted in 1980, and which itself operates retroactively as well as prospectively, contains a principle that one who arranges for the treatment or disposal of a hazardous substance may be liable for remediation costs, even if that party did not conduct the processing or disposal itself. See *id.* at 56a-57a.[10]

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[10] Petitioner Commonwealth Edison argues (Com Ed Pet. 21-22) that CERCLA would not support arranger liability for one in its position. It argues, for example (*id.* at 21), that only one who maintains ownership or control over the hazardous substance may be subject to arranger liability. But the arranger liability cases cited by the court of appeals (SMUD Pet. App. 56a-57a) do not turn on which party maintained technical title to the processed and disposed materials, and such an inquiry would make especially little sense in a situation like this one, where many of the customers

Second, even before CERCLA, principles of common law liability, as summarized in the Restatement (Second) of Torts § 427b (1965), made clear that "those arranging for processing of hazardous materials could potentially have been liable under the common law for environmental damages arising from the processing." See SMUD Pet. App. 61a.

b. Petitioners lay great stress on the fact that EPACT has a retroactive reach of up to 33 years, as the government began offering commercial enrichment services in 1969. See Com Ed Pet. 1-2, 8, 23-24. This Court's due process decisions make clear, however, that a statute's retroactive reach is less significant than the justification for imposing retroactive liability. Indeed, the Court has upheld the retroactive application of a statute that reached back much longer than the EPACT assessments. In *Turner Elkhorn*, the Court upheld the retroactive application of the black lung benefit program, which, for benefit claims filed after July 1, 1973,

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furnished the unenriched uranium to DOE for processing and then received the enriched uranium afterwards. See Com Ed Pet. 2. The enrichment services were plainly performed with the intent that the utilities would receive the enriched uranium, even if DOE held technical title to the uranium during the enrichment process. Com Ed also argues (*id.* at 21 n.17) that recent cases have rejected CERCLA liability for "mere purchases of products." However, the case cited by Com Ed for that proposition, *Concrete Sales & Servs., Inc.* v. *Blue Bird Body Co.*, 211 F.3d 1333 (11th Cir. 2000), is quite different from this case. In that case, the purchaser of services (electroplating services) furnished and received a product that was not, either before or after the electroplating, a hazardous substance. See *id.* at 1339. This case, however, involves processing of uranium, which is the quintessential ultrahazardous substance. See SMUD Pet. App. 62a. In any event, our point is not that EPACT follows every aspect of CERCLA liability, but rather that CERCLA's provision for arranger liability for processing of hazardous substances put nuclear utilities on notice that they could be required to contribute to the costs of remedying contamination caused by enrichment services that they had ordered.

made mine operators responsible for miners' black-lung benefits regardless of the date the miner left employment, see 428 U.S. at 8-10—and indeed, benefits had been awarded to miners who had left mine work as much as 50 years earlier. See *id.* at 40 n.4 (Powell, J., concurring in part and concurring in the judgment in part). Similarly, CERCLA has an unlimited retrospective reach, but no court of appeals has invalidated that statute on retroactivity grounds. See *United States* v. *Monsanto Co.*, 858 F.2d 160, 173-174 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989).

Rather than cut off the retroactive effect of EPACT at an arbitrary date, Congress determined that each nuclear utility's liability for the special assessments should be proportionate to the amount of enriched uranium it had actually received and retained. That approach was a fair and rational means of allocating the utilities' responsibility to contribute to decontamination costs, by which each utility's liability is correlated to the extent that it derived a benefit from the enrichment services that caused the contamination problem. The utilities are assessed only for decontamination and decommissioning costs related to the uranium enrichment program, from which they benefited, in direct proportion to their use of enrichment services. They are not assessed for unrelated costs, such as the cost of remedying general pollution.[11] Moreover, contrary to petitioners' assertion that

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[11] Petitioners argue (Com Ed Pet. 4, 17-18, 27 n.20) that Congress improperly required them to contribute to the cost of cleaning up thorium and uranium processing sites unrelated to the uranium enrichment services that they purchased from DOE. That contention is incorrect. The overall statutory scheme makes clear that Congress intended petitioners' contributions to the Fund to be applied only to cleaning up DOE's uranium enrichment facilities. EPACT provides that the utilities' special assessments were intended for "decontamination and decommissioning of the Department's gaseous diffusion [uranium] enrichment facilities," see 42 U.S.C. 2297g-1(g) (referring to utilities' right to pass-through to con-

EPACT's retroactive assessments are inconsistent with *Eastern Enterprises*, the plurality opinion in that case expressed no doubt that receipt of a benefit is a rational basis for the imposition of retroactive liability to address a societal problem associated with that benefit. See 524 U.S. at 536 (opinion of O'Connor, J.) (noting that Congress could legitimately have made miners' former employers liable for the miners' employment-related health-care costs, given that employers benefited from miners' labor; citing *Turner Elkhorn*).

c. At bottom, petitioners' substantive due process challenge to the EPACT assessments can be reduced to their contention that, because the DOE enrichment plants were already contaminated from prior military uses before the government began offering commercial enrichment services, the government must bear all the cost of remediation—even though petitioners also concede that enriching the utilities' uranium caused the same kind of contamination as did enrichment for military purposes (or would have caused the same kind of contamination, had the facilities not already been contaminated). See SMUD Pet. 22a & n.2. That argument is unavailing.

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sumers "[a]ny special assessment levied under this section * * * for decontamination and decommissioning"), and the subchapter of EPACT containing the special-assessment provision also defined the term "decontamination and decommissioning" to mean activities "undertaken to decontaminate and decommission inactive uranium enrichment facilities." See EPACT § 901, 106 Stat. 2923 (adding 42 U.S.C. 2297(6) (1994), repealed by Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. III, ch. 1, subch. A, § 3116(a)(1), 110 Stat. 1321-349). Although the Fund established by EPACT is also the source of monies used to clean up thorium and uranium processing sites, see 42 U.S.C. 2296a-2(b), the monies for cleaning up thorium and uranium processing sites are to be drawn from the government's contributions to the Fund, see 42 U.S.C. 2296a-1; 42 U.S.C. 2296a-2 (1994 & Supp. V 1999), and the utilities have not been assessed for that purpose.

Nothing in the Due Process Clause required Congress to assign financial responsibility for clean-up costs only to the *first* user whose services contributed to the contamination of an enrichment facility, when all subsequent users of the facility received the same services that cause that kind of contamination. Congress could perhaps have adopted a rule that the first user of DOE's enrichment services should pay for the entire cost of decontamination, but it determined instead that the costs should be borne collectively by all of those entities whose uses of the enrichment services would have contributed to the contamination of the enrichment facilities, in proportion to the benefit the entity received from those enrichment services. "It is surely proper for Congress to legislate retrospectively to ensure that costs of a program are borne by the *entire class* of persons that Congress rationally believes should bear them." *Sperry*, 493 U.S. at 65 (emphasis added).

Indeed, petitioners are arguably required to pay considerably less than their fair share of the decontamination costs, for responsibility for 68 percent of those costs is assigned by EPACT to the government. As the court of appeals noted, "these utilities are obligated to pay only about a third of the remediation costs, even though evidence was presented [to Congress] that the 'production from these plants ha[d] been divided almost evenly between the government and commercial sectors.'" SMUD Pet. App. 49a (quoting H.R. Rep. No. 474, *supra*, Pt. 1, at 144).[12]

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[12] Petitioner MYAP argues (MYAP Pet. 25 n.17) that the government has not in fact contributed its allocated share to EPACT, since annual appropriations to the Fund in some years have been somewhat less than the amounts authorized by EPACT. In fact, we have been informed by DOE that the government's total contributions to the Fund through Fiscal Year 2001 amount to approximately $2.684 billion, whereas amounts contributed by the utilities pursuant to the EPACT assessments amount to approximately $1.482 billion. Thus, the government has contributed

Where the cost allocation scheme chosen by Congress is rational, courts are not empowered to engage in an evidentiary fact-finding inquiry, as demanded by petitioners, to determine whether the allocation of costs should or could be different. Whether some other approach would have been wiser is not a question of constitutional dimension, but is rather a policy question for Congress, not the courts. See *Turner Elkhorn*, 428 U.S. at 19 ("It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension.").

## CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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considerably more than half of the amount in the Fund, even though Congress understood that about half of DOE's enrichment services were attributable to the commercial sector.

(3)

No. 01-1411

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IN THE

# Supreme Court of the United States

COMMONWEALTH EDISON COMPANY,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

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IN THE

**SUPREME COURT OF THE UNITED STATES**

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COMMONWEALTH EDISON COMPANY,
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UNITED STATES OF AMERICA,
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# BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON ENERGY OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION

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## Statement of Interest

The Committee on Energy (the "Committee") of The Association of the Bar of the City of New York (the "Association") files this brief as *amicus curiae* urging that the petition for a writ of certiorari be granted.[1]

The Committee is one of the standing committees of the Association, a voluntary bar association with more than 20,000 members. Since its inception, the Committee, established to report on matters relating to energy, has actively participated in the consideration, development and

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[1] Written consents to the filing of this brief *amicus curiae* were provided by the parties and submitted to the Court in conjunction with this filing. No counsel for a party authored the brief in whole or in part, and no person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

interpretation of much of the legislation and regulation pertaining to the field of energy. The November 20, 2001 decision of the Federal Circuit involves a determination whether $2.25 billion in retrospective assessments imposed on the ratepayers of domestic nuclear utilities by the Energy Policy Act of 1992 can be reconciled with the Due Process and Takings Clauses of the Fifth Amendment as construed by this Court and other Circuits.

This case presents important social and legal issues within the Committee's sphere of responsibility, in that it determines in a direct and substantial way the extent to which the basic pricing mechanism for retail electric service may be constitutionally made vulnerable to severely retroactive assessment programs imposed by Congress which significantly increase the price consumers are required to pay for decades-old use of electricity. This case also establishes whether Congress may permissibly impose vicarious, tertiary third-party liability on utility ratepayers for past environmental damage caused directly by the Government itself at Government facilities in transactions distinct from the generation of electricity. Accordingly, an *amicus curiae* brief is desirable to ensure that the important issues at stake are fully developed for the Court's review.

## Reasons for Granting the Writ

### A. In assessing the constitutionality of EPACT, the actual funding scheme provided for by Congress must be taken into account, particularly the express provision that targets utility ratepayers as the source of $2.25 billion in retrospective assessments.

The decontamination and decommissioning ("D&D") special assessment created by the Energy Policy

Act of 1992 ("EPACT"), 42 U.S.C. § 2297g et seq., requires that $150 million be collected annually for a period of fifteen years exclusively from domestic nuclear utilities that had previously purchased enriched uranium in arm's length transactions with the government. In some instances, the commercial purchases of enrichment services subject to the assessment reach back more than forty (40) years to the 1950s. Although the assessments are imposed upon the utilities, EPACT expressly provides that ratepayers are ultimately responsible for paying these costs. Indeed, EPACT renders State regulatory agencies powerless to prevent the pass-through of the assessments. At the end of the program's fifteen years aggregate EPACT D&D exactions from ratepayers will have reached $2.25 billion.

Even assuming, arguendo, that the Federal Circuit had jurisdiction to hear and determine Due Process and Takings Clause objections to the constitutionality of the EPACT D&D assessments,[2] and further assuming that that

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[2] There are substantial questions whether the Court of Federal Claims or the Court of Appeals for the Federal Circuit, as Article I legislative courts, are possessed of the same constitutional authority as Article III courts to determine the validity of Congressional legislation and, in appropriate circumstances, find that legislation is constitutionally infirm. The Committee is unaware of any authority supporting the jurisdiction of these courts to entertain claims that an enactment of Congress is unconstitutional other than in connection with a claim for money damages against the United States, and it appears that this is the first case to do so. This Court has frequently held that jurisdiction to determine the constitutionality of federal statutes lies with the district courts. See, e.g., *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993); *Hodel v. Irving*, 481 U.S. 704 (1987); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). Until the issuance of its decision in this case, the Federal Circuit has agreed. See *Crocker v. United States*, 125 F.3d 1475 (Fed. Cir. 1997); *Florida Rock Indus. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987); *Yeskoo v. United States*, 101

court correctly formulated and applied appropriate tests in order to assess constitutionality, its analysis failed from the very outset either to acknowledge the totality of the EPACT statutory scheme or to assess the constitutionality of the Act with respect to all of the appropriate parties. EPACT sets forth very specific provisions as to how assessments are to be collected. The parties directly targeted by Congress as ultimately responsible for payment of the D&D assessments are utility ratepayers, and, therefore, *their* status and interests must be considered for purposes of evaluating the constitutionality of EPACT under the Due Process and Takings Clauses.

EPACT provides in pertinent part that a special assessment shall be "collect[ed]" from domestic utilities, 42 U.S.C. § 2297g-1(c), and that "[a]ny assessment levied under this section ... shall be fully recoverable in rates in all jurisdictions ...," 42 U.S.C. § 2297g-1(g). Although the Federal Circuit explicitly acknowledged EPACT's ratepayer payment requirement, and even pronounced that it was "binding on state regulatory agencies," in assessing the constitutionality of the special assessments the fact that EPACT provides the $2.25 billion in special assessments will be paid entirely by *ratepayers* was inexplicably ignored.

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F.3d 715 (Fed. Cir. 1996). Nonetheless, the Federal Circuit began its *en banc* decision below by stating that "[t]his is one of a large number of cases brought in the Court of Federal Claims challenging the constitutionality of the Energy Policy Act of 1992...." *Commonwealth Edison Co. v. United States*, 271 F.3d 1327, 1329 (Fed. Cir. 2001). On this threshold matter of the jurisdictional basis for the Court of Federal Claims to entertain due process claims, the decision in *In re Chateaugay Corp.*, 53 F.3d 478 (2d Cir.), *cert. denied*, *LTV Steel Co. v. Shalala*, 516 U.S. 913 (1995), reaches a different conclusion as to Court of Federal Claims jurisdiction.

The fact that EPACT expressly targets ratepayers was given no consideration in the Federal Circuit's analysis of the constitutionality of EPACT.[3] Instead, the Federal Circuit proceeded to apply novel Due Process and Takings Clause tests of its own creation exclusively to the *utility*, Commonwealth Edison, rather than to Commonwealth's *ratepayers* as clearly provided by EPACT. The court's failure to treat EPACT and its explicit financing scheme as an integral statute produced an entirely different, and erroneous, constitutional analysis that should receive the careful scrutiny of this Court.

The Federal Circuit's disregard of the critical statutory feature specifying who bears responsibility for paying the special assessments was crucial to the court's

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[3] Commonwealth's standing to contest the EPACT special assessments was appropriately not questioned in the Federal Circuit's decision. Commonwealth alleged damages from EPACT that were unique to it alone, including damage to its competitive standing in electric markets compared to other utilities who bear no EPACT obligations. Moreover, as a technical matter, the liability for the assessments falls *prima facie* on Commonwealth. Under the precepts of *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1948), Commonwealth's "injury was complete when it paid the excessive [assessments]," and "the mere payment of an improper charge constituted a prima facie case of injury and damage." *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco, Dep't of Business Reg.*, 496 U.S. 18 (1990), confirmed that neither a plaintiff's standing to challenge an assessment as unconstitutional nor its right to recover a refund of such assessment were affected by opportunities to collect some or all of the assessments from customers. In the circumstances here, were the EPACT special assessments finally to be overturned as unconstitutional, either Congress' own provision for rate treatment at 42 U.S.C. § 2297g-1(g) and/or the operation of state rate-regulatory authority in unwinding the assessments would function to benefit the EPACT special assessment ratepayer-payors.

constitutional inquiry, and should have produced vastly different results. Were the court to have applied each of the test elements it had itself identified to the ratepayers who represent the sole source of the assessments, rather than to the utility, then entirely different conclusions as to the consistency of EPACT with Due Process and the Takings Clause would have been reached.

By looking to this Court's decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Federal Circuit concluded that legislation creating severely retroactive assessments could be justified in those instances where, based upon the history of the relationship between the parties, "expectations of future benefits had been created," and that "the obligation to pay benefits could not be imposed on [entities] that had no role in creating those expectations." *Commonwealth Edison*, 271 F.3d at 1343. In this instance, the only role occupied by Commonwealth's ratepayers is that of present and future consumers of electrical service. It is beyond dispute that such ratepayers are complete strangers to all enriched uranium transactions with the Government.

Surely ratepayers could have had no role whatsoever in creating any governmental expectation that *they* would relieve plant retirement and cleanup costs occurring at the Government's own facilities. Furthermore, Commonwealth Edison's ratepayers throughout the fifteen-year special assessment payment period were certainly not "benefited from the government's operation of the uranium enrichment facilities," *Id.* at 1342, and indeed many of Commonwealth's ratepayers now saddled with paying the

special assessments were not even alive when the transactions forming the basis for the assessments began in the 1950s.[4]

Another constitutionality test applied by the court below, whether imposition of retroactive liability was "contrary to that party's reasonable expectations," *Id.* at 1346, provides no greater support for the decision. Among the sub-elements of this test identified by the Federal Circuit were whether the problem addressed by the assessments was known at the time the activity was engaged in, and whether the subsequent assessments could have been reasonably anticipated. *Id.* at 1349. Posing such questions to the appropriate (and only) assessment obligor designated by Congress in EPACT -- ratepayers -- can only result in the

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[4] The Committee does not question the constitutionality of legislation having only limited and circumscribed retrospective application, such as to cover a lapse in an expired statutory authorization, to create a transition between tax or rate years, or for similar reasons that have a rational basis, are expressly delineated, and capable of individualized judicial evaluation. In *Connolly v. PBGC*, 475 U.S. 211, 224 (1986), this Court characterized Takings Clause evaluation of retroactive legislation as requiring "factual inquiries into the circumstances of each particular case." Following such analyses, the constitutionality of legislation with relatively brief retrospectivity is properly upheld. All of the Justices in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), found the period of retroactivity to be of constitutional significance, consistent with the Court's prior decisions such as *McKesson Corp. v. Div. of Alcoholic Beverages*, 496 U.S. 18, 41 (1990), where the Court noted that "beyond some temporal point the retroactive imposition of a significant tax burden may be 'so harsh and oppressive as to transgress the constitutional limitation.'" The amount involved here -- $2.25 billion -- and the period of retrospectivity -- assessments on 1950s transactions due in 2007 -- far exceed the "customary congressional practice" of enacting revenue-generating legislation "confined to short and limited periods required by . . . practicalities," a standard upheld in *United States v. Carlton*, 512 U.S. 26 (1994), citing *United States v. Darusmont*, 449 U.S. 292 (1981). It is in such a context that the Committee urges review on certiorari.

conclusion that the assessments violate Due Process under the very standards articulated by the Federal Circuit.

Indeed, every test, factual inquiry and standard applied by the Federal Circuit in concluding that $2.25 billion in EPACT special assessments do not offend the Due Process or Takings Clauses produces a different outcome when the express funding provisions mandated by EPACT are acknowledged and the constitutional interests of the parties who are the source of the assessments -- ratepayers -- are recognized. The fundamental, studied misconception of the provisions of EPACT utilized by the Federal Circuit and the quite different conclusions as to constitutionality that are reached when EPACT is viewed as an integral statute warrant the review of this Court.

**B. In construing the constitutionality of EPACT by analogy to CERCLA, the Federal Circuit's decision would expand vicarious environmental remediation responsibility to tertiary third parties: the customers of the customers of the party solely responsible for environmental damage, in this instance the Government.**

A significant justification relied upon by the Federal Circuit to uphold the constitutionality of EPACT's $2.25 billion in special retrospective assessments was the so-called "polluter pays" principle arising under the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq. In the Committee's view, a grant of certiorari need not be accompanied by a review of CERCLA. Rather, the Federal Circuit misapprehended the uncontroverted facts of the enriched uranium purchase transactions here involved in its attempt to place them in a CERCLA setting. A properly

conducted CERCLA analysis would not yield the conclusions or support the results reached below.

Overlooking the assertions of Commonwealth Edison that the utility had exercised no dominion, control or influence over the Government's production processes and practices at its uranium enrichment facilities, and that these facilities had long ago been fully contaminated by prior production of nuclear weapons, the Federal Circuit concluded that the mere purchase of enriched uranium from the Department of Energy by the utility subjected its ratepayers to special assessment liability.

In so ruling, the court below completely disregarded the acknowledgment by the Government that the assessments are "not premised upon any responsibility for contamination." Gov't C.A. Br. at 31. Instead, three factors were deemed to be determinative of a sufficient degree of anticipation that $2.25 billion in special assessments would be forthcoming in order to sustain their validity: the subjective views of the *utility* as to a) the foreseeability of its subsequent liability for cleanup costs, b) the inclusion of such costs in the contract price for enriched uranium, and c) awareness of the Government's waste disposal methods.

The court's silence on these factors as they pertain to Commonwealth's *ratepayers* is notable. Nowhere are the indicia of awareness of the potential for subsequently arising pollution cleanup liability attributed to those parties *ultimately responsible* for the special assessments, even deeming the assessments as the equivalent of CERCLA liability.

The parties obligated to supply all $2.25 billion in special assessments -- ratepayers -- possess none of the

transactional awareness or capability for anticipation of subsequent liability deemed determinative by the Federal Circuit. The sole basis for imposing this liability on them is their use of electricity through the year 2007. The Federal Circuit's logic thus pronounces a wholesale expansion of CERCLA-type liability by making strangers to the transactions presumed to have created environmental harm (and the basis for the $2.25 billion in special assessments) not merely indirectly responsible, but *solely* responsible for *all* environmental remediation costs allegedly relating to those transactions.

After giving full recognition to the funding arrangements mandated by Congress in enacting EPACT, the court's decision below can therefore be viewed in no other way than upholding conclusive tertiary third party liability for the customers of the customers of the polluter, who in this instance was the Government itself. This liability attaches without any provision for fact-finding related to the circumstances of the environmental harm. Furthermore, such liability is final, unreviewable and vicarious, and it is also exclusive. Such an astonishing expansion of environmental remediation liability, and its imposition solely on complete strangers to the underlying transactions, should receive the most careful scrutiny in accordance with this Court's prior Due Process and Takings Clause decisions.

The Federal Circuit's CERCLA analogy is flawed from the perspective of well-established Takings Clause principles as well. Central to the court's logic was that "the imposition of an obligation to pay money does not constitute an unconstitutional taking of property," *Commonwealth Edison*, 271 F.3d at 1340. Commonwealth replied that what was really "taken" were rights of contribution and indemnification against the Government in its capacity as sole

owner and operator of the uranium enrichment facilities. In the court's own words, "Edison argues that both under CERCLA and the common law, in a suit between the responsible parties, liability would be allocated between those responsible parties according to their relative contributions [to creation of the environmental problem]," *Id.* at 1356.

In any meaningful sense, and according full significance to the court's CERCLA analogy, it is the utility's cause of action against the Government as facility operator to establish its own lack of culpability that has been "taken" by EPACT.[5] Under EPACT, $2.25 billion in assessments to

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[5] The court misapprehended CERCLA liability as well. This Court has explained that CERCLA liability is intended "to impose[] the costs of cleanup on those responsible for the contamination." *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 7 (1989). CERCLA creates potential liability for the "owner" and "operator" of facilities where hazardous substances are created, as well as the "arrange[r]" and "transporter" of hazardous substances undergoing disposal or treatment, see 42 U.S.C. § 9607(a). Neither Commonwealth Edison nor the electric customers of Commonwealth are potentially responsible parties under CERCLA. Until now, no court has suggested that potential CERCLA liability may arise from the mere purchase of goods (which are not themselves undergoing environmental remediation) produced at a facility where hazardous substances were created. Numerous circuits have held that in the absence of actual control over the manufacturing process leading to creation of hazardous substances, or ownership of the substances being produced ("work in progress"), CERCLA does not impose customer liability, *see United States v. Shell Oil Co.*, 2002 U.S. App. LEXIS 2188 (9th Cir. Feb. 11, 2002); *General Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F. 2d 281 (2nd Cir. 1992); *Concrete Sales & Servs., Inc. v. Blue Bird Body Co.*, 211 F. 3d 1333 (11th Cir. 2000). In the principal case relied upon by the Federal Circuit, *United States v. Aceto Agric. Chem. Corp.*, 872 F. 2d 1373 (8th Cir. 1989), the defendant at all times owned the hazardous substance-creating work in progress.

fund retirement costs at the Government's enrichment facilities become due and owing with no recourse and without any regard to the payors' past conduct.

A cause of action is "property" within the meaning of the Fifth Amendment, *Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952), and a statute expunging such a legal right and sequestering it for the Government's own benefit is a classic constitutional Taking, *see Armstrong v. United States*, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. A fair interpretation of this constitutional protection entitles these lienholders to just compensation here."). The Federal Circuit's construction of this central feature of EPACT as a mere obligation to pay money is irreconcilable with the functional result of EPACT to deprive Commonwealth of not only all opportunities for

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Moreover, CERCLA itself *requires* that there be an allocation of environmental remediation costs among responsible parties, 42 U.S.C. §§ 9607(e)(2) and 9613(f). In the enriched uranium purchase transactions upon which EPACT premises Commonwealth Edison's special assessment liability, it is clear that Commonwealth had no cognizable relationship with either the hazardous waste in question or the "work in progress" at the Government's facilities, nor did the utility have familiarity with or influence over the operation of those facilities. All such factors were in the Government's exclusive dominion and control. Commonwealth Edison's ratepayers were further removed still. Since the Federal Circuit precludes *any* opportunity for Commonwealth to establish either for itself or its ratepayers that the Government, as sole owner and operator of the enrichment facilities and the work in progress, should bear CERCLA responsibilities, that result is *completely contrary to*, rather than supported by, CERCLA.

liability-shifting, but also express statutory CERCLA rights upon which the court's analysis presumes to rely.[6]

### C. The Government's direct economic self-interest in shedding itself of uranium enrichment enterprise facility retirement costs incident to the privatization of that merchant enterprise should be accorded considerable significance in assessing the constitutionality of EPACT.

The Federal Circuit accorded no significance to the context in which EPACT arose, or that a principal purpose of the legislation was to facilitate the privatization of the Government's uranium enrichment enterprise to the privately-owned, for-profit United States Enrichment Corporation ("USEC"). The very same EPACT that created $2.25 billion in special assessments to be paid entirely by ratepayers was also expressly intended by Congress to create and enable the private company USEC "to operate as a business enterprise on a profitable and efficient basis," and to "maximize the long-term value of [USEC] to the Treasury of the United States." 42 U.S.C. § 2297g and g-1, App. 101a-103a. Although the Federal Circuit relied upon CERCLA analogies to uphold EPACT, under CERCLA subsequent buyers of an enterprise become potentially responsible for environmental

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[6] The court below was by no means unaware of the necessary implications or consequences of its ruling to environmental remediation liability. The Federal Circuit noted that "[the utilities'] liability may be passed on to the customers of the utilities to the extent that the utilities' rates are established by traditional rate-making," *Commonwealth Edison*, 271 F.2d at 1356-57, and rather than treating this integral provision of the statute as a significant element of its constitutional analysis, instead found it to be a *salutary* feature of EPACT *supporting* its constitutionality.

remediation expenses, 42 U.S.C. §. 9607(a)(1). Nonetheless, EPACT relieves USEC from such liabilities *entirely*, 42 U.S.C. § 2297g-2(c).

The significance of the articulated objective of EPACT to spin off the Government's uranium enrichment business while simultaneously exculpating the buyer from incurring any environmental remediation costs cannot be disregarded in evaluating whether the imposition of special assessments is constitutional, or whether this factor may have comprised an inappropriate motive that guided the terms of the legislation. In *Eastern Enterprises*, Justice Kennedy pointed out that "[g]overnmental self-enrichment" was a significant factor in determining whether a "taking" existed. 524 U.S. at 544. Justice Souter, with three other Justices concurring, said in *United States v. Winstar Corp.*, 518 U.S. 839, 898 (1996), that "The greater the Government's self-interest, ... the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence...."

In this proceeding the circumstances are particularly egregious inasmuch as ratepayers, instead of either the Government's divestiture or enriched uranium contracting partners, represent the entire source of the $2.25 billion to be collected. The very same statute that facilitated a private sale of one of the Government's commercial enterprises with the stated purpose of maximizing value to the Treasury also happened to create an entirely new, enormous financial obligation imposed exclusively on a precisely delineated category of parties -- the ratepayers of nuclear utilities. Previous to EPACT these parties were complete strangers to the enriched uranium transactions, and at no time had any interest in privatization. The confluence of these two features in the same statute, which the Federal Circuit

found to be of *no significance whatsoever*, should instead be entitled to the most careful consideration for its relevance to whether EPACT can withstand Due Process and Takings Clause challenges.

**Conclusion**

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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No. 01-1411

IN THE

# Supreme Court of the United States

COMMONWEALTH EDISON COMPANY,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF OF AMICUS CURIAE FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

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## INTEREST OF AMICUS CURIAE

The Federal Circuit Bar Association ("FCBA") is a national organization comprising approximately 2,400 attorneys whose practices concern the United States Court of Appeals for the Federal Circuit in all aspects of its jurisdiction. The FCBA offers a forum for the discussion of legal issues of common interest and dialogue between the bar and the judges of the Federal Circuit. One purpose of the FCBA is to offer assistance and advice to the federal courts, including filing briefs *amicus curiae*, on matters affecting practice before the Federal Circuit and lower tribunals.[1]

Pursuant to Supreme Court Rule 37.2(a), the FCBA has conferred with the parties regarding the filing of this brief *amicus curiae*, and both have consented to its filing. The parties' letters of consent are on file with the clerk.

The FCBA respectfully submits this brief in support of the petition for certiorari filed by Petitioner Commonwealth Edison Company.[2] The FCBA seeks to offer a practitioner's perspective on the impact of the Federal Circuit's decision in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001) ("*Commonwealth Edison*") on the government's contracting partners.

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[1] Pursuant to Supreme Court Rule 37.6, the FCBA states that no counsel for a party authored this brief in whole or in part. No person or entity, other than the *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of the brief.

[2] The FCBA likewise supports the petitions for certiorari in the following related cases decided on the bases articulated in *Commonwealth Edison Co. v. United States*, 271 F.3d 1327 (Fed. Cir. 2001): *Omaha Pub. Power Dist. v. United States*, No. 01-1398; *Maine Yankee Atomic Power Co. v. United States*, No. 01-1155; and *Sacramento Mun. Util. Dist. v. United States*, No. 01-1020.

## SUMMARY OF THE ARGUMENT

The decision below has sown and will sow substantial confusion in an area of law where certainty is at a premium—the myriad procurement and service contracts the United States must enter with private enterprise. *Commonwealth Edison* is at odds with this Court's jurisprudence regarding the constitutionality of retroactive legislation and with the Court's repeated pronouncements that the government cannot use its power as sovereign to rewrite its contractual relationships with private parties.

The test adopted by the *en banc* Federal Circuit effectively gives the Government *carte blanche* to retroactively alter its own contractual rights and obligations in commercial transactions closed long ago. The lower court's focus on the "benefit" to the party complaining of the retroactivity is misplaced in the area of government contracts. Every government contractor will have received some benefit as part of the mutuality of consideration necessary to form a contract in the first place. Moreover, rather than focusing on the reasonable expectations of the parties *under the contract,* the Federal Circuit cited general regulatory trends and the heavily regulated nature of the industry to effectively trump express contractual terms. This analysis is contrary to the approach of five Members of the Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), where the lack of any contractual provisions for lifetime health benefits at the time of the transactions was central to the conclusion that Eastern Enterprises could not be forced to bear retroactive liability for such costs. Where parties enter into fixed-price contracts with the United States for services or for the delivery of goods, they are entitled to rely upon settled contract law which clearly provides that no further monetary liability can be assigned to the transaction.

These critical errors led the Court below to endorse retroactive legislation—certain provisions of the Energy

Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 ("EPACT")—that is substantially more severe, especially in monetary effect, than that rejected by the Court in *Eastern Enterprises*. Because of these errors and the substantial importance of the issues, this Court's intervention is essential. The Court need not and should not await a circuit conflict where the exclusive jurisdiction of the Court of Federal Claims under the Tucker Act makes such a conflict unlikely. Moreover, much like the situation in *United States v. Winstar Corp.*, 518 U.S. 839 (1996), the Court's guidance is needed in order to resolve the dozens of related cases pending in the Court of Federal Claims.

Finally, this case presents the Court with an excellent vehicle to resolve several issues that have troubled the lower courts after *Eastern Enterprises* and *Winstar*. The court below issued a categorical ruling that the Takings Clause does not apply to the exaction of money payments to the United States. In addition, the lower court's ruling that no vested contract right is involved in this case rests on a clear misapplication of the sovereign acts doctrine as applied in *Winstar* and numerous previous government contract cases. For these reasons, the FCBA respectfully urges the Court to grant review of the decision below.

## ARGUMENT

### I. *COMMONWEALTH EDISON* ENDORSES RETROACTIVE SELF-DEALING BY THE GOVERNMENT IN CONTRAVENTION OF THIS COURT'S FIFTH AMENDMENT AND GOVERNMENT CONTRACTS PRECEDENTS.

It is a fundamental principle of this Court's Fifth Amendment jurisprudence that the retroactive reassignment of rights and duties is highly disfavored. This principle finds expression in the emphasis the Court has placed on

reasonable, investment-backed expectations in its Takings Clause jurisprudence, *see Kaiser Aetna v. United States*, 444 U.S. 164 (1979), and in due process cases that reject retroactive laws that "change the legal consequences of transactions long closed." *See Eastern Enterprises,* 524 U.S. at 548 (Kennedy, J., concurring in the judgment and dissenting in part). Where the government rewrites the obligations of a fixed class of persons based upon past commercial activities or completed transactions, the danger that the government is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States,* 364 U.S. 40, 49 (1960), is at its zenith. Moreover, because the affected class had neither notice nor an opportunity to alter its conduct to avoid liability, the Due Process Clause's protection against arbitrary and fundamentally unfair government action is directly implicated.

These Fifth Amendment principles apply (and have been repeatedly vindicated by this Court) where the party affected by retroactive legislation is not in privity with the United States. *See Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998); *United States v. Sec. Indus. Bank*, 459 U.S. 70 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). The dangers of retroactive legislation are vastly magnified where the Government alters the obligations of its own contracting partners after the fact. This Court has unfailingly distinguished between legislation that is "relatively free of government self-interest" and legislation that impermissibly "seeks to shift the cost of meeting [the Government's] legitimate public responsibilities to private parties." *See Winstar*, 518 U.S. at 896; *Perry v. United States*, 294 U.S. 330, 350-51 (1935). "The greater the Government's self-interest . . . the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence . . . ." *Winstar*, 518 U.S. at 898.

The decision below creates significant tension with *both* settled Fifth Amendment principles against retroactive legislation *and* the doctrine that the government should not be able to employ its power as sovereign to advance its narrow commercial interests at the expense of its contracting partners. The *Commonwealth Edison* court decided that the Nation's utilities, which acquired or used enriched uranium from their contracting partner, the United States, through fixed-price contracts dating as far back as the 1950s, can collectively be required to pay up to $2.25 billion for the decontamination and decommissioning of the government facilities that enriched the uranium. The Federal Circuit's decision has particularly grave consequences for those who contract with the Government, as they can no longer rely on the well-settled legal standards that have traditionally governed those contractual relationships.

### A. *Commonwealth Edison* Compounds The Uncertainty Left By *Eastern Enterprises* Over When Severely Retroactive Exactions Violate The Fifth Amendment.

*Commonwealth Edison* represents a marked and significant departure from the traditional standards for assessing the constitutionality of retroactive legislation as applied to the Government's contracting partners. The FCBA respectfully submits that this departure will invite the Government to abuse its power as sovereign to rewrite its contractual obligations with private parties, long after both sides have fully performed them. In fact, the court expressly declined to give any weight to the contractual relationship between the Government and Commonwealth Edison in assessing the merits of the utility's Fifth Amendment claims. *See Commonwealth Edison*, 271 F.3d at 1348.

This approach departs from settled law governing the rights and obligations that arise from government contracts.

"[T]he power of the Congress to control or interdict the contracts of private parties" differs significantly from "the power of the Congress to alter or repudiate the substance of its own engagements." *See Perry*, 294 U.S. at 350-51. Where, as here, retroactive liability is imposed on the basis of privity with the Government, that contractual relationship should be crucial to the due process analysis. Indeed, due process challenges arising out of the Government's "impairment of its own [contractual] obligations" may even warrant a more stringent standard of review. *See National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 471 & n.24 (1985). The Federal Circuit's decision to discount this critical factor entirely cannot be squared with the Fifth Amendment precedents of this Court.

In fact, *Commonwealth Edison* makes it easier for the Government to rewrite its own contractual obligations than to adjust contractual rights among private parties. Under the Federal Circuit's new test, even "severely retroactive and costly" legislation targeting the Government's own contractual relationships must be upheld if the contractors: (1) "benefited" from the Government's performance, and liability is not "disproportionately imposed"; and (2) had "reasonable expectations" that their purchase of government services would expose them to future liability for costs incurred by the Government in performing the contracted services. *See Commonwealth Edison*, 271 F.3d at 1346.

The first prong will be satisfied in virtually every government contract case, no matter how arbitrary or unfair the legislation: The mutuality of benefit that serves as consideration to support every contract is sufficient, in the Federal Circuit's view, to justify the imposition of enormous retroactive liability. *See id.* This cannot be the law. The existence of a contractual relationship with the United States (and the failure to assign this particular cost to the contractor) should be a critical (if not decisive) factor *against* allowing the Government to impose retroactive liability. The

Federal Circuit's position means that government contracts receive *less* protection against the retroactive alteration of obligations than do contracts between private parties.[3]

Likewise, *Commonwealth Edison's* application of its "reasonable expectations" test ignores that where, as here, a private party has entered a contract with the Government, vague considerations such as whether the party operates in a "highly regulated industry" or could have "reasonably anticipated" retroactive legislation, *see Commonwealth Edison*, 271 F.3d at 1348, should be beside the point. Rather, the contractor's "reasonable expectations" should be deemed to arise, as a matter of law, from the contract itself.[4] Given that a contract need not contain any "second promise" by the Government not to demand more for its services *after* performance, *see Winstar*, 518 U.S. at 887, it makes little sense to say that a contractor may nonetheless be deemed to have "expected" retroactive liability imposed on the basis of that contract. In other words, "[w]hile it is true enough . . . that one who deals with the Government may need to '"turn square corners,"' . . . he need not turn them twice." *Id.* at 922 (Scalia, J., concurring in the judgment).[5]

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[3] The inquiry into whether the retroactive liability is "disproportionate" to the benefit is similarly misplaced in this context. The contract itself assigned burdens and benefits regarding the transaction at issue—*any* subsequent reassignment of risks and benefits that were known to exist at the time of the contract is "disproportionate."

[4] In *Kaiser Aetna*, a government permit to develop a pond, although not a contractual undertaking, was a government promise sufficient to create reasonable, investment-backed expectations that the government was bound to respect. *See* 444 U.S. at 179. *A fortiori* an express contract between the government and a private party concerning the very transaction at issue should be the central factor in judging the expectations of the parties to the contract.

[5] In *Eastern Enterprises*, five Members of the Court concluded that retroactive liability violated the Fifth Amendment in large part because Eastern Enterprises itself had exited the coal mining business before any contractual promises of lifetime benefits had been made to the miners. *See* 524 U.S. at 535 (plurality opinion); *id.* at 550 (Kennedy, J.,

These errors are symptomatic of the confusion that has reigned in the lower courts since *Eastern Enterprises* issued. Courts have had great difficulty in applying both the Takings Clause and the Due Process Clause to retroactive legislation in light of *Eastern Enterprises* and have not been able to distill any core principles from Justice O'Connor's plurality opinion combined with Justice Kennedy's concurring opinion. *Compare United States Fid. & Guar. Co. v. McKeithan*, 226 F.3d 412, 420 (5th Cir. 2000) ("Justice Kennedy's due process analysis focuses on retroactivity and is essentially harmonious with the reasoning of the other four justices."), *with Ass'n of Bituminous Contractors v. Apfel*, 156 F.3d 1246, 1254-55 (D.C. Cir. 1998) ("[T]he only binding aspect of *Eastern Enterprises* is its specific result."). Because the retroactive liability in *Commonwealth Edison* is even more severe than that at issue in *Eastern Enterprises* and because past privity with the Government raises the issue of the taking of a vested contract right, this case provides an excellent vehicle for a majority of the Court to provide guidance on the proper factors to be considered in assessing retroactive legislation under both the Due Process and Takings Clauses.[6]

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(Continued . . .)

concurring in the judgment and dissenting in part). The retroactivity there violated reasonable expectations because of the lack of notice of potential obligations. *See id.* at 530-31 (plurality opinion); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Here, the combination of fixed-price contracts and the 1984 Settlement Agreement created a contractual right not to be exposed to further costs for enriched uranium paid for and delivered decades before. The court below essentially ignored these contractual expectations in contravention of the views of a majority of the Court in *Eastern Enterprises*.

[6] The decision below also categorically held that the Takings Clause never applies to legislation requiring the payment of money, unless a specific fund of money is involved. *See Commonwealth Edison*, 271 F.3d at 1340. This conclusion rests, at least in part, on a stray footnote in *United States v. Sperry Corp.*, 493 U.S. 52, 62 n.9 (1989), to

### B. *Commonwealth Edison* Erodes The Finality And Protection That Fixed-Price Contracts Afford Buyers.

The Government and its contracting partners have long understood that "[w]here one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *United States v. Spearin*, 248 U.S. 132, 136 (1918). In a fixed-price contract, the seller bears the risk that the actual cost of performance will be greater than anticipated. *Dalton v. Cessna Aircraft Co.*, 98 F.3d 1298, 1305 (Fed. Cir. 1996). Once the contract has been fully performed, the rights, obligations, and risks set forth in the contract become vested property rights because contracts are property. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). Accordingly, the Government cannot deprive its business partners "of the fruits actually reduced to possession of contracts lawfully made." *Sinking-Fund Cases*, 99 U.S. 700, 720 (1879).

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(Continued . . .)

the effect that money is "fungible." But as Judge Kozinski has noted regarding *Sperry*, "[n]owhere . . . does the Supreme Court suggest that the government's obligation to pay compensation is eliminated because it takes money rather than real or personal property." *Washington Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 867 (9th Cir. 2001) (Kozinski, J., dissenting). Moreover, in the FCBA's view, the taking in this case is properly conceptualized as the taking of a vested contract right to pay a fixed price for certain goods. Of course, contract rights themselves are property under the Fifth Amendment. *See Lynch v. United States*, 292 U.S. 571, 579 (1934); *see also Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 121 (1924). Even putting the contract aside, the fact that EPACT liability follows possession and use of discrete property (*e.g.*, government-enriched uranium) distinguishes this case from cases like *Eastern Enterprises*. Thus, this case offers the Court a vehicle to address which government actions should be evaluated under the Takings Clause and which are subject to due process analysis.

*Commonwealth Edison* erodes these vital principles in the law of government contracts. "The bargain struck between the government and [utilities] was simple." *Yankee Atomic Elec. Co. v. United States*, 112 F.3d 1569, 1582 (Fed. Cir. 1997) (Mayer, C.J., dissenting), *cert. denied*, 524 U.S. 951 (1998). The Government provided enriched uranium to the utilities and they paid a fixed price in return. The fixed price was required to capture all performance costs. *See Barseback Kraft AB v. United States*, 121 F.3d 1475, 1478 (Fed. Cir. 1997) ("[T]he Atomic Energy Act of 1954 . . . provided that 'any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time.'"). When the contracts at issue were formed, the need to decontaminate and decommission the Government's enrichment facilities was well understood. *Commonwealth Edison*, 271 F.3d at 1332, 1349; *see also* Petition for a Writ of Certiorari, *Commonwealth Edison Co. v. United States*, No. 01-1411 at 3-4 n.3 (citing government study that clean-up obligation was known at contract execution and contamination was no greater in 1992 than in the 1960s). Indeed, clean-up costs were an element of the fixed price. *Barseback Kraft AB*, 121 F.3d at 1483.

The utilities were entirely rational in expecting that the Government's price included clean-up costs, or at the very least, that the risk that the fixed prices would cover those costs resided with the Government as the fixed-price seller. This view was confirmed in 1984, when the utilities terminated their existing contracts to replace them with a new "Utility Services Contract." *Commonwealth Edison*, 271 F.3d at 1331. The parties terminated the prior, outstanding contracts through a "Supplemental Agreement of Settlement," *id.*, which provided the utilities with a waiver of liability and further obligation: "'the Government agrees that all obligations arising under the [previous] contracts or by

reason of their termination shall be deemed to be concluded,'" *id.* at 1332 n.3.

Under longstanding contract interpretation and Fifth Amendment principles, Commonwealth Edison had every reason to believe that as a commercial customer of the Government, it bore no obligation beyond the fixed price it had negotiated and paid. It had no reason to believe that it would be the victim of a massive exaction to fund the Government's clean-up of the enrichment plants it had neglected for years after military uses had polluted them. *Maine Yankee Atomic Power Co. v. United States*, 271 F.3d 1357, 1364 (Fed. Cir. 2001) (Friedman, J., concurring). But that is exactly what EPACT did.

Whether viewed through the lens of ordinary contract law or the Fifth Amendment, the risk that the clean-up costs would be greater than anticipated resided squarely with the Government. While this risk assumption embraces increased costs "in the event of unforeseen circumstances," *Dalton*, 98 F.3d at 1305; *see also* John Cibinic, Jr., & Ralph C. Nash, Jr., *Formation of Government Contracts* 1079 (3d ed. 1998) (fixed-price government contract "places the risk of incurring unforeseen costs on the [seller]"), here the costs were actually foreseen; they simply may have been underestimated by the party that agreed to bear them.[7]

*Commonwealth Edison* compromises years of settled legal principles concerning the exchange of risk under fixed-price contracts. The Government may not "simply shift costs of legislation onto its contracting partners who are adversely affected by the change in the law, when the Government has assumed the risk of such change." *Winstar*, 518 U.S. at 883. This Court should reaffirm the fundamental

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[7] The Federal Circuit's suggestion that the foreseeability of these costs somehow works to the utilities' detriment, *see* 271 F.3d at 1349, is also confusing. That the government knew of the risk and nonetheless offered fixed-price terms only confirms that it knowingly accepted the risk that clean-up costs might exceed its estimates.

principle that "[t]he United States does business on business terms," *United States v. Nat'l Exch. Bank of Baltimore,* 270 U.S. 527, 534 (1926), and this includes assuming the same risks any seller does in a fixed-price contract. Contractors negotiating billions of dollars in contracts with the Government are entitled to clear rules about fixed-price contracts, so that they can adjust their behavior accordingly. Otherwise, *Commonwealth Edison* will have "the untoward result of compromising the Government's practical capacity to make contracts[.]" *Winstar*, 518 U.S. at 884.

### C. *Commonwealth Edison* Magnifies Uncertainty About The Unmistakability And Sovereign Acts Doctrines.

As with its treatment of fixed-price contracts, *Commonwealth Edison* leaves tremendous uncertainty in its wake about the applicability of the sovereign acts and unmistakability doctrines. This, in turn, makes it exceedingly difficult for government contractors to negotiate and enter contracts with the Government, because the rules governing them are now unsettled.

By relying on the sovereign acts and unmistakability doctrines to reject Commonwealth Edison's claims that the United States breached its contracts or abrogated vested contract rights under the Fifth Amendment, the Federal Circuit has extended their application to situations they were never intended to address. These doctrines are inextricably tied to situations in which the Government's performance of a contract has been rendered impossible by a public and general governmental act. *See Winstar*, 518 U.S. at 895-96 (plurality opinion); *id.* at 921, 923 (Scalia, J., concurring).

In those circumstances, the Government (like any private contractor) will not be held liable for its nonperformance, unless its own actions caused the impossibility. *Id.* at 895-96. The sovereign acts and

unmistakability doctrines place the Government in the same position as a private contractor by permitting the defense of impossibility where the Government as sovereign has rendered contract performance impossible by the Government as contractor, *unless* it has contractually waived that defense in unmistakable terms. More specifically, the sovereign acts doctrine provides that the impossibility defense is available where a "public and general act[]" prevents the Government's performance of a commercial contract. *See Horowitz v. United States*, 267 U.S. 458, 461 (1925). The unmistakability doctrine, in turn, states that even where the act is a sovereign one, if the Government by contract forfeited in unmistakable terms its excuse for nonperformance, the excuse is lost, and the Government must answer in damages. *Winstar*, 518 U.S. at 877-78.

These doctrines have no application here because the contracts were fully performed by both parties. Neither nonperformance nor impossibility is at issue. Rather, the question is whether, after the contracts have been fully performed, the Government may charge the utilities for its increased performance costs, when it expressly assumed that very risk. In concluding that these doctrines apply, the Federal Circuit has "adopt[ed] [a] rule of construction that would weaken the Government's capacity to do business by converting every contract it makes into an arena for unmistakability litigation," a result against which this Court warned. *Id.* at 886. These doctrines were never intended to apply to "humdrum [fully performed] contracts" like these. *Id.* at 880. *See also id.* at 911 (Breyer, J., concurring) ("[b]oth common sense and precedent make clear that an 'unmistakable' promise to bear the risk of a change in the law is not required in every circumstance").

The Federal Circuit's specific application of these doctrines causes further confusion for contractors and their counsel. The Federal Circuit has effectively held that the sovereign acts doctrine will *always* attach to legislation and

insulate the Government from breach *unless* the legislation (or other sovereign act) applies *solely* to the government's contracting partners. *Commonwealth Edison*, 271 F.3d at 1340; *Yankee Atomic Elec. Co.*, 112 F.3d at 1575. The FCBA respectfully suggests that this is not the proper test.

In *Winstar* itself, the legislation did not apply solely to the Government's contracting partners. *Winstar*, 518 U.S. at 902. Nor would the Federal Circuit's test be appropriate: "Legislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." *Id.* at 902-03. The test articulated in *Winstar*'s principal opinion focuses, not on the legislative aim, but on its impact and effect: "[A] governmental act will not be public and general if it has the *substantial effect* of releasing the Government from its contractual obligations." *Id.* at 899 (emphasis added).

This test is clearly met here. EPACT's assessment attaches to "purchases" of enriched uranium from the Government. *Commonwealth Edison*, 271 F.3d at 1333. At least eighty-five percent of EPACT's assessments fall on those that procured enriched uranium directly from the Government, with the balance falling on those that bought it from the original puchaser. In fact, unlike the statutory scheme at issue in *Winstar*, EPACT is entirely retroactive. The Federal Circuit's conclusion that "[a]ny impact that this approach may have on those utilities with which the Government had prior contracts is merely incidental to the accomplishment of a broader governmental objective," *Yankee Atomic Elec. Co.*, 112 F.3d at 1576 (internal quotations omitted), cannot withstand scrutiny.[8]

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[8] Even assuming that EPACT was a sovereign act, the Federal Circuit's application of the unmistakability doctrine will create further confusion in the world of government contracts. Given the fixed-price nature of the contracts, the Government's knowledge of its clean-up

## II. *COMMONWEALTH EDISON* WILL PROFOUNDLY AND ADVERSELY AFFECT TRANSACTIONS BETWEEN THE GOVERNMENT AND ITS CONTRACTORS.

From a practical standpoint, the Federal Circuit's decision in *Commonwealth Edison* is "at odds with the Government's own long-run interest as a reliable contracting partner in the myriad workaday transactions of its agencies." *See Winstar*, 518 U.S. at 883. As this Court has recognized, "expanding the Government's opportunities for contractual abrogation" can have the untoward effect of "undermining the Government's credibility at the bargaining table and increasing the cost of its engagements." *See id.* at 884. We respectfully suggest that *Commonwealth Edison* will have precisely that effect.

### A. *Commonwealth Edison* Will Adversely Impact The Negotiation And Execution Of Government Contracts.

The Government and its contracting partners "generally rely on contract law 'to reduce the costs of contract negotiation by supplying contract terms that the parties would probably have adopted explicitly had they negotiated over them.'" *Winstar*, 518 U.S. at 884 n.27 (quoting Richard A. Posner & Andrew M. Rosenfield,

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(Continued . . .)
obligations, the requirement that prices recoup expenses, and the 1984 Settlement Agreement releasing Commonwealth Edison of its obligations under its existing contracts, it is difficult to imagine what more it needed to protect against an exaction triggered by having done business with the Government. *See Winstar*, 518 U.S. at 887 (plurality opinion) (there is "no need for an unmistakably clear 'second promise.'"); *id.* at 921 (Scalia, J., concurring) (there is no need for "a further promise not to go back on the promise to accord favorable regulatory treatment").

*Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. Legal Stud. 83, 88-89 (1977)). Indeed, "judicial interpretations of a contractual provision form part of the background against which parties make their contract." *Salsbury Indus. v. United States*, 905 F.2d 1518. 1523 (Fed. Cir. 1990) (Duff, J., dissenting). By creating increased uncertainty in an already unsettled area of the law, *Commonwealth Edison* will force the Government and its contracting partners to incur potentially significant additional expenses in negotiating and executing their contracts.

After *Commonwealth Edison*, the fixed-price terms of a government contract no longer support the expectation that the buyer will pay only that amount, and that the seller assumes the risk that additional expenses may be incurred. Now, a company that has purchased goods or services from the Government may be exposed to liability for additional exactions 40 to 50 years after the transaction. Likewise, a company that purchases a government product from another private company is exposed to that same liability. This is true even if the Government had actual knowledge of the risk at the time it contracted to sell that product.

Nor is it enough, after *Commonwealth Edison*, to rely on a "Settlement Agreement," entered with the Government at the conclusion of performance, indicating that all obligations have been fulfilled. Even where a contractor has paid the agreed price for the Government's goods and services, it will be deemed to have received sufficient "benefit" to expose it to new, massive and wholly retroactive assessments. This is especially true if the area is one of the many in which the Government generally "regulates."

Now government contractors and their counsel must seek to exact concessions to insulate against the risk of future assessments. The contractor must seek, at a minimum, the following agreements: (1) the price is fixed; (2) the contractor will not be subject to any future fee or exaction based on its contract with the Government or its use

of products delivered under such contracts; (3) in the event an exaction is nevertheless imposed, the Government unmistakably agrees to indemnify the contractor; and (4) the government official with whom it negotiates has actual authority to bind the Government to these concessions. Indeed, this last concession alone imposes an onerous burden. *See Commonwealth Edison*, 271 F.3d at 1355 (stating that even if Government officials had represented that "regulatory legislation would not be enacted," that would not suffice because "those authorities had no authority to bind the Government"). This list of new issues raised by the *Commonwealth Edison* decision demonstrates the extent to which it departs from standard contract principles and will deter parties from doing business with the Government.

### B. *Commonwealth Edison* Will Adversely Affect The Government's Interests.

Given the difficulty of negotiating and drafting contractual provisions to address all of the contingencies created by *Commonwealth Edison*, the decision will undoubtedly compromise the Government's ability "to obtain needed goods and services from parties who might otherwise, quite rightly, be unwilling to undertake the risk of government contracting." *See Winstar*, 518 U.S. at 913 (Breyer, J., concurring).

*Commonwealth Edison* compromises the vital predictability that previously attached to fixed-price, fully performed government contracts. This, in turn, will increase the risk and costs of government contracting. On one hand, "[f]ear of post-investment opportunism by the government may well deter parties from relying on the government's promises as much as they should for the sake of efficiency." *See* Daniel E. Troy, *Retroactive Legislation* 20 (1998). Some contractors will simply elect not to contract with the Government, and instead turn to other market sources for

supplies, services, and customers. In fact, the option existed here to obtain enriched uranium from alternate sources, an option that utilities likely would have exercised had they believed they would be subjected to EPACT's exaction.

On the other hand, those contractors willing to deal with the Government will demand compensation for assuming the risk that the price paid today for a service or purchase may be significantly raised by the Government tomorrow, thereby factoring that risk into the cost of the contract. Ultimately, of course, it is the Government (*i.e.*, the taxpaying public at large) that must bear these increased costs in government contracting.

In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), the court acted to mitigate precisely these risks. There, the Court held that federal law preempted state tort law in actions against government contractors who comply with government design specifications, because the application of state tort law "will directly affect the terms of government contracts: either the contractor will decline to manufacture the design specified by the Government, or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507. The same practical reasons require the Court's intervention here.

### C. *Commonwealth Edison* Disrupts Investment-Backed Expectations Based Upon Settled Law.

The new test fashioned by the Federal Circuit may permit severely retroactive and costly legislation to withstand constitutional challenge even if the government contractor could not reasonably have expected such legislation. *See Commonwealth Edison*, 271 F.3d at 1345-46. *Commonwealth Edison* thus has immense consequences for government contractors that have already made business decisions—some, like those in this case, involving hundreds

of millions of dollars—in reliance on the well-established principle that the Government cannot retroactively impose liability where none could be reasonably expected. This is especially true where, as here, the underlying contract was for a fixed price and was fully and satisfactorily performed.

*Commonwealth Edison* noted that even though foreign suppliers of uranium enrichment services emerged in the late 1970s and early 1980s, Commonwealth Edison "elected . . . to continue to use government processing facilities even though . . . foreign alternatives became available." *See Commonwealth Edison*, 271 F.3d at 1331. That decision was informed in large part by the relative costs of foreign and domestic enrichment services. By essentially raising the price paid by Commonwealth Edison for the Government's enrichment services retroactively, EPACT reaches back to alter quite substantially a factor that played no small role in Commonwealth Edison's decision to continue purchasing enrichment services from the Government even after foreign competition arose.

Likewise, the Court of Federal Claims emphasized that the utilities received a "benefit" in that "by purchasing the government's service, the utilities avoided the cost of building and cleaning up its [sic] own plant." *See Commonwealth Edison Co. v. United States*, 46 Fed. Cl. 29, 45 (2000). If anything, this observation underscores the negative consequences that flow from severely retroactive legislation. Any decision by Commonwealth Edison not to invest in "building and cleaning up its own plant" would have been based on whether it would have been more cost-effective at the time to "contract out" that service to the Government based on the Government's price. By raising the cost of the Government's services *ex post*, EPACT may well have nullified the utility's original value assessment. This upsetting of investment-backed expectations is precisely what the general prohibition on severely retroactive laws serves to guard against.

## CONCLUSION

For these reasons, *amicus curiae* Federal Circuit Bar Association respectfully urges this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 01-1411

IN THE

# Supreme Court of the United States

COMMONWEALTH EDISON CO.,
*Petitioner,*

v.

UNITED STATES OF AMERICA,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS COMMONWEALTH EDISON CO., OMAHA PUBLIC POWER DISTRICT, SACRAMENTO MUNICIPAL UTILITY DISTRICT AND YANKEE ATOMIC ELECTRIC COMPANY*

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## I. INTEREST STATEMENT OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] It represents an underlying membership of more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Many of the Chamber's members provide goods and services to, or purchase goods and services from, the United States under government contracts. The Chamber regularly advocates its members' views in Supreme Court and other appellate forums. It initiates and enters litigation involving issues of national concern to the American business community.

We write to address the interests of the government contracting community many of whose number are members of the Chamber. Our interest in critical government contracting issues has led to amicus presentations to the Court in the past not only in *United States v. Winstar Corp.* 518 U.S. 839 (1996) but also in other cases such as *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) and *Landgraf v. USI Film Products*, 511 U.S. 244 (1994).

Few issues affecting contracting with the United States government are more fundamental to our members' interests than the very sanctity of those contracts. The seemingly narrow context of this case is wholly offset by the flagrant abuse here of the statutory process to amend, abrogate, and repudiate contract terms. The license given to the Executive

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[1] Pursuant to Supreme Court Rule 37.6, the Chamber hereby affirms that no counsel for any party authored any part of this brief, and that no person or entity other than the Chamber and its legal affiliate, the National Chamber Litigation Center, Inc., provided financial support for its preparation or submission.

Branch and Congress by the Circuit decision transcends the abuse that this Court struck down in *Winstar*. *Winstar*, unfortunately left open, and clearly unresolved, some of the mechanisms to breach a contract upon which the government defends and the Circuit has allowed. We believe a significant clarification of the parameters of *Winstar* is critical at this time. This is a plea for the sanctity of contracts for those who would do business with the government. In this context we invoke this Court's admonition in *Winstar*: "We have also recognized, however, that "'[i]t is no less good morals and good law that the Government should turn square corners in dealing with the people than that the people should turn square corners in dealing with their government.'" *Winstar*, 518 U.S. at 886 n.31 (quoting *Heckler v. Community Health Services. of Crawford Cty., Inc.*, 467 U.S. 51, 61 n. 13, (1984) paraphrasing Holmes, J., *Rock Island, A. & L. R. Co. v. United States*, 254 U.S. 141, 143 (1920)).

## II. REASONS FOR GRANTING THE WRIT

### A. THE UNIQUE NUCLEAR "BUSINESS" IS NOT A LICENSE FOR THE GOVERNMENT TO AMEND ITS CONTRACTS

The nuclear business in the United States is uniquely a pervasive creature of law and regulation. It is the proximate product of the efforts during World War II to create a nuclear weapon. The obvious ability of nuclear energy to provide power generation was not lost on the government and, under the Eisenhower administration, a program called "Atoms for Peace" was begun that had as its objective stimulating the development of commercial uses of nuclear energy, primarily in the development of commercial power generation. *Westinghouse Electric Corp. v. United States*, 598 F.2d 759 (3rd Cir. 1979).

Throughout, however, the government retained near total control over every aspect of the nuclear business. This

obsession with control was certainly justified by the national defense and safety risks inherent in virtually every aspect of the creation of nuclear energy, including the enrichment of fuel for purposes of power generation. But the government has been an uncertain partner in commercializing nuclear energy. It has, in many cases planned its participation poorly; it has changed its policy "mind" about activities critical to making commercial uses of nuclear energy cost effective and even feasible; and it has strung out the commercial power industry in determining costs, providing a consistent regulatory pattern for designs, safety, storage of spent fuel and nearly every other component of design and operation for which the government exercises near-absolute control. See, e.g., *NL Industries v. United States*, 12 Cl. Ct. 391 (Appendix) (1987), aff'd 839 F.2d 1578 (Fed. Cir. 1988).

Against this background, it is important to recognize that in virtually no other industry are the commercial participants so dependent on the government to "do the right thing." The regulatory process controls every aspect of the business, from cradle to grave; sources of fuel and the disposal of spent fuel and wastes are tightly controlled by the government. And nowhere is the government's control more absolute then in the contracting process. Not only are the contracts with the government in this enterprise contracts of adhesion, as are all government contracts, but here, the contracts are, literally, statutory contracts, their creation and terms having been prescribed to an extraordinary extent by statutes and implementing regulations. Gilbert A. Cuneo and Eldon H. Crowell, *Impossibility of Performance – Assumption of Risk or Act of Submission?*, 29 Law and Contemporary Problems: Government Contracts Part II, 531, 548-49 (1964). The authors conclude that "[c]onditions and clauses in a government contract are on a take-it-or-leave-it basis; there is no Freedom of choice." *Id.* at 549.

From this picture, the Circuit seemingly drew the conclusion that the petitioners were on notice that the terms of their contracts might change and that the government was entirely justified in unraveling the contracts retroactively. Thus, the court found that, not only were there no unmistakable terms of obligation, but, somehow, the contractors should have anticipated that their contracts would be reopened to address some additional consideration that the government concluded it desired but had purposefully omitted from the contracts.

We suggest to this Court that the Circuit reached an erroneous conclusion. It misconstrued the obligations of "regulatory dependence," and it improperly violated the sanctity of the contracts: Obligations of regulatory dependence are not a license for the government to abrogate its contracts. First, contracts of adhesion, generally, impose on the dominant party an obligation not to overreach the other contracting party and to assure that the terms and conditions are both clear and unchanging. Where, moreover, the government's dominant position is nearly absolute, we believe it has an enhanced duty of fairness. *Art Metal USA, Inc., v. Solomon,* 473 F. Supp. 1, 3 (D.C. 1978). In *Helene Curtis Industries v. United States*, 160 Ct. Cl. 437 (1963), Judge Oscar Davis wrote:

> Although it is not a fiduciary toward its contractors, the Government – where the balance of knowledge is so clearly on its side – can no more betray a contractor into a ruinous course of action by silence than by the written or spoken word.

*Id. at 444.*

Here, "betrayal" may be replaced by "entrapment." "Silence" is represented by the government's intentional

failure to include its D&D costs in its contract negotiations with petitioners. The facts in this case demonstrate the following: (1) the government had operated the enrichment facilities for many years solely for purposes of national defense; (2) in the course of those operations it had contaminated the facilities, to some extent through its own negligence; (3) at the creation of the supposedly for-profit United States Enrichment Corporation (USEC), the government was well aware of the contamination, its need to remediate the facilities and the fact that including the cost of such remediation in the liabilities of USEC would make the creation of USEC a certain failure; (4) with this knowledge, the government retained the obligation of remediation in its creation of USEC and, the concomitant costs of such remediation, there being no means in law or equity to lay off such costs on anyone else; (5) starting in the 1970s, the government faced fierce price competition from foreign suppliers and could not possibly have competed successfully if its contracts had sought to impose liability for remediation costs on its customers; (6) the government testified before Congress that it omitted those remediation costs from the commercial enrichment contracts intentionally; (7) after inducing customers to purchase enriched uranium with promises of fixed prices, the government thereafter went to Congress and secured legislation that effectively increased the costs of those purchases by requiring these same customers to pay for the remediation services. These facts have, somehow, engendered the utterly despotic notion that, rather than owing duties to the contractor similar to parens patriae, the government can exercise an Orwellian power to twist funds from its contracting partners. The government here had a heightened obligation of fealty to those it had induced by contract into a relationship with it.

## B. WINSTAR LAW IS UNFINISHED BUSINESS IN ADDRESSING THE GOVERNMENT'S RELATIONSHIP WITH ITS CONTRACTING COMMUNITY

It was not long after this Court's decision in *Winstar* that the concepts articulated therein were in serious trouble before the Federal Circuit. The ink was barely dry on *Winstar* when the Federal Circuit handed down its decision in *Yankee Atomic Electric Co. v. United States,* 112 F.3d 1569 (Fed. Cir. 1997), cert. denied, 524 U.S. 957 (1998). This was the precursor of the cases presently before this Court.

A major problem left unsolved in *Winstar* is the lack of parameters for the application of either the sovereign acts doctrine or its companion the unmistakability doctrine. The latter is particularly unmanageable. The application of these two doctrines is left uncertain and, apparently from the Circuit decision, not well understood on the basis of this Court's *Winstar* opinion.

Even before reaching the question of the application of these two doctrines, however, in the context of this case, the *Winstar* result finds additional strength. Here, there was a clear intent to enter into express contracts, a starting assumption that the government contested in *Winstar*. *Winstar* at 862. The importance of this fact is that there is an attendant merger presumption that all the terms intended by the parties are present in the subject instruments. Similarly, there is an unrebutted presumption that the contracts fully expressed their intended considerations, that is, they had complete mutuality. After *Winstar*, this is a case where the government simply breached its contracts by inducing Congress to pass a contract-specific law, the objective of which was abrogation.

Sovereign Acts is a concept that is applicable where the statute in question is intended to function as a "public and

general" law. *Horowitz v. United States*, 267 U.S. 458, 461 (1925). Stated otherwise, "[t]he United States as a contractor are not responsible for the United States as a lawgiver." *Deming v. United States* 1 Ct. Cl. 190, 191 (1865). But these statements do not inform particularly because it can be said that ALL statutes are "public and general." It has become clear, however, that the intended dichotomy has to do with the breadth of the statute. On the one hand a statute may be of broad expanse in intended application, such as in the case of general revenue taxation. Or, at the other extreme, it may intend to effect some specialized purpose that would limit its application to a narrow sector...which is perhaps previously the subject of other enactments. This is now understood to encompass the amendment of a previously enacted statutory program the effectuation of which is carried on by contract. About such statutory amendments to contracted programs, this Court warned in *Winstar* that "[l]egislation can almost always be written in a formally general way, and the want of an identified target is not much security when a measure's impact nonetheless falls substantially upon the Government's contracting partners." *Winstar* 518 U.S. at 902-903.

The clear suggestion here was that, if the intended focus of the legislation falls "substantially" on a contracted program, it will not meet the criteria for "public and general." It is not unfair to assume that this Court intended some linkage between a statute and an objective to modify a particularized prior government program undertaking, especially where the program's objectives are effectuated in the form of contracts. This kind of linkage classically self serves. Far more clearly even then the statute at issue in the *Winstar* case itself, the EPACT was intended to fall "substantially" upon the enrichment contracting partners...solely in fact.

The notion of umistakability appears to have meaning only if a statute first passes a "public and general test." This

is so because if a statute is singularly focused on a contracted program, it is not only not public and general, it bespeaks an actionable intent to breach the contracts. If it is necessary, however to reach unmistakability at all, we suggest that umistakability, applied to fixed terms contracts with the United States is an anachronism and should be abandoned expressly by this court. Our analysis starts with Madison's admonition, repeated by the trial court in *Winstar*:

> If the United States mean to obtain or deserve the full praise due to wise and just governments, they will equally respect the rights of property, and the property in rights: they will rival the government that most sacredly guards the former; and by repelling its example in violating the latter, will make themselves a pattern to that and all other governments.

James Madison, *Property (1792),* reprinted in 6 The Writings of James *Madison* 101, 103 (Gaillard Hunt ed., 1906), quoted in *Winstar Corp. v. United States,* 25 Cl. Ct. 541, 553 (1992).

Nor does the concept of unmistakability find any home in the principal contract case precedents of this Court. The fundamental problem created by pinning the concept to a contract with fixed terms is that it makes the contract illusory. This Court stated in *Perry* that such a result is unacceptable:

> On that reasoning, if the terms of the government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the

> Congress can disregard the obligations of the government at its discretion, and that, when the government borrows money, the credit of the United States is an illusory pledge.

*Perry v. United States*, 294 U.S. 330, 350 (1935).

While the Court there was dealing with "money" there appears little distinction between the contracts in which the *Perry* borrowing took place and the contracts here. Both were contracts with fixed terms which established the reasonable expectations of the parties. See also *Murray v. Charleston*, 96 U.S. 432, 445 (1877) ("It is against the rules, both of law and of reason, to admit by implication in the construction of a contract a principle which goes to the destruction of it.")

And *Lynch v. United States,* 292 U.S. 571 (1934), is no different in its strict adherence to the preservation of the sanctity of contracts with the government. If anything *Lynch* presents a setting very close to the instant case:

> Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy, but an act of repudiation.

*Lynch* 292 U.S. at 580.

The *Lynch* court stated precisely the motive of the statute in the instant case. And there is nothing in this Court's decision in *Lynch* to suggest that the outcome was predicated on an express undertaking by the United States not to abrogate its obligations.

The application of "unmistakability" to fixed terms contracts turns the principles of contract law on their head,

even those applicable to the government as a contracting party. It is not the contractor who must beware of the absence of an umistakable rights provision in a contract in order to avoid an illusory result, it is the government that must put into a law enabling a contract or into the contract itself a reservation of a right to make changes in terms and conditions later. *Lynch*, 292 U.S. at 578, 579.

Indeed, the government does have regulations that reserve to it the right to make changes when such "changes" are desired. See, Federal Acquisition Regulation ("FAR") Part 43, Subpart 43.2 but such reserved authority is meaningfully limited to "changes" within the "scope" of the contract and does not include a unilateral right to change payment terms or the amount of revenue that can be generated from the contract. It is, moreover, accepted that absent even this limited reservation of a "changes" right, a material, unilateral imposition on contract terms would be a breach. *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982).[2] Similarly, the government, in terms prescribed by regulation, may avoid breaching its contracts by "terminating" them. (See, FAR Part 49. But, even here, the right to rely on a "termination" clause is limited. *See also*, *United States v. Speed*, 75 U.S. 77 (1868).

The history of government contracting demonstrates the government's understanding that it is obliged to contract for terms that will allow it to alter its obligations. This understanding is certainly consistent with this Court's several statements on the subject. This understanding is not consistent with the notion that the absence of such

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[2] For a period of years the government did have a statutory right literally to renegotiate the profit terms of its contracts. That right to "renegotiation" however, was engraved in an express law and in the contract terms themselves. *Lichter v. United States*, 334 U.S. 742 (1948).

reservations nevertheless suggests the presence of such rights of change. Yet this is the essence of "unmistakability" when applied to contracts with fixed terms. This Court should address this open issue the impact of which threatens the underpinnings of the Government's relationships with its contracting patrons.

### C. MATERIAL SELF INTEREST SHOULD REQUIRE THE COST OF STATUTORY CHANGES TO BE BORNE BY THE GOVERNMENT

This Court has stated that: The greater the Government's self-interest ... the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence. *Winstar* 518 U.S. at 898.

Under these terms, it would be hard to imagine an act more dictated by pure self interest then one which legislated a change in contract terms to force a contracting party to clean up the government's self-made mess. There is no universe of considerations to add which suggests that the national good was at stake or even that the new statutory obligation was a quid pro quo for services rendered. Those services rendered were compensated fully under the terms of the contracts themselves. The obligation to remediate was one which the government had owned, prior to the contracts in issue, as a result of its operation of the enrichment facilities solely for purposes of national defense.

But the issue of self interest does not stop with this remarkable law mandating that a stranger to the mess clean it up. It is equally important to look back at the making of the contracts in the first place. As the Petitioners have described to this Court, the enrichment facilities were created singularly for purposes of national defense and operated on that basis for a number of years during which the contamination was

generated, in part by the government's own negligence. Then, the facilities were opened to commercial enrichment services. Why? The answer is very simple: the government was serving its (not the petitioners') interests thereby. It is clear that the operation of these facilities was extraordinarily expensive. It is also obvious that the facilities had considerable unused capacity.

The objective of providing commercial enrichment was simply to enlarge the operating base and thereby to spread the fixed and semi-variable operating costs over that larger base, making each unit of production thereby less expensive to the government. It follows that the government elected not to attempt to price the remediation costs into the contracts for the simple reason that the government's attempts to self serve by reducing its unit costs of production would have been lost.

The Circuit's decision vaguely suggests that the imposition of this statutory payment obligation "... would not be contrary to that party's reasonable expectations." This is entirely contrary to the realities of the then existing contracting environment. In addition, however, the analogy may properly be drawn to this Court's pronouncements relating to "investment backed expectations." *See, e.g., Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). This exact analogy was drawn by this Court in *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998), and was amplified by the Circuit in the instant case. *Commonwealth Edison Co.*, 1347-1349. In a contract setting, the expectations are far more easily defined then in the classic takings setting. The expectations may generally be found on the face of the contract, defined in the services to be provided and the price to be paid. For the Circuit, under such circumstances, to reach out beyond the contract and attempt to identify "reasonable expectations" that were plainly not part of the contract was sheer speculation; and it was profoundly wrong at that. The Circuit seemed not to

understand that the contract nexus set this case apart from its strained attempt to connect the Petitioners to their regulated environment.

The petitioners changed position in reliance on the terms of the contract: they abstained from alternative sources of the enrichment services the prices for which were certainly competitive. They relied on contemporaneous oral promises from their counterpart government officials. They relied on the knowledge that the contracts were negotiated in a competitive market place wherein the government was constrained to offer its best price. The "investment" that the petitioners made in the execution and performance of their obligations under the contract was contractually predicated on the "expectation" that the government would not abrogate the negotiated terms. It is clear that, had the Petitioners not changed their position in reliance on the terms of their contracts, they would have no liability under this statute. Arguably, the government would not have had this convenient base against which to relieve itself of the costs of contamination that it had itself generated.

The contrary view suggests a cynicism borne of the assumption that regulated industries members have no unimpeachable contract rights when dealing with their regulators and should be prepared for all manner of impositions. This is not ever the law in non-socialist democracies and here, it also seriously imposes upon a relationship that was initiated and fostered by the government over a period of five decades, always with the assumption that the contractor-Petitioners were materially dependant on the government adhering to its contracts and otherwise treating its nuclear energy partners fairly.

## D. GRANTING CERTIORARI WILL ALLOW THIS COURT TO RESOLVE RETROACTIVITY ISSUES IMPORTANT TO THE GOVERNMENT'S CONTRACTING PARTNERS

As this Court held in the seminal case of *Horowitz:*

> Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons. *** In this court the United States appear simply as contractors; and they are held to be liable only within the same limits that any other defendant would be in any other court.

*Id.* at 461 (emphasis added) (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)). Accordingly, the government may agree by contract to assume certain risks. When it does, the terms of its bargain will be enforced. *See Winstar*, 518 U.S. at 843; *Lynch,* 292 U.S. at 580; *Perry*, 294 U.S. at 353 ("[T]he right to make binding obligations is a competence attaching to sovereignty").

Nevertheless, the Federal Circuit in this case permitted the government to abrogate its contractual obligation to assume the risk of increased costs that the government assumed by virtue of its fixed price contracts. If the decision is allowed to stand, it will not only upset the expectations of Petitioners and the other utilities who entered into fixed price contracts with the government, but also the expectations of every other company or individual who has ever contracted with the government.

While Congress has broad authority to adjust the burdens of economic life, its powers are not unlimited. *See Eastern*

*Enterprises*, 524 U.S. at 523-529. For example, this Court has long recognized that the Due Process Clause "protects the interests in fair notice and repose that may be compromised by retroactive legislation." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266 (1994). Moreover, "provisions affecting contractual or property rights [are] matters in which predictability and stability are of prime importance." *Id.* at 271. Because EPACT attaches new legal consequences to contractual relationships completed decades before its enactment, Congress has overstepped the bounds of its legislative authority. *Cf. United States v. Carlton*, 512 U.S. 26, 38 (1994) (O'Connor, J., concurring) ("In every case in which we have upheld a retroactive federal tax statute against due process challenge, however, the law applied retroactively for only a relatively short period prior to enactment"). The Chamber submits that when Congress acts to repudiate the government's contracts, it is not entitled to the same degree of deference accorded Congress when it enacts economic legislation benefiting third parties.

By granting certiorari in this case, the Court will be able to resolve this issue – which is of grave importance but not addressed in either *Landgraf* or *Eastern Enterprises* – namely, what level of scrutiny applies where Congress has legislated for its own benefit.

Even applying the limited judicial scrutiny enunciated in *Eastern Enterprises,* however, EPACT fails to meet the constitutional challenge. The plurality and concurring justices in *Eastern Enterprises* agreed that the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act") was unconstitutional as applied to Eastern Enterprises. If the Coal Act is unconstitutional, there can be no doubt that EPACT is also unconstitutional.

In *Eastern Enterprises* the plurality determined that Coal Act was unconstitutional as applied to Eastern because the

Coal Act imposed a severe retroactive liability on Eastern that Eastern could not have anticipated and because the liability imposed on Eastern was substantially disproportionate to Eastern's experience. 524 U.S. at 528-537. As such, the plurality concluded that the Coal Act violated "fundamental principles of fairness underlying the Takings Clause." *Id.* at 537. As shown by Petitioners' briefs, EPACT imposes as severe, if not more severe, retroactive liability on utilities than what the Coal Act sought to impose on Eastern.

Justice Kennedy agreed that the Coal Act was unconstitutional, but based his opinion on the Due Process Clause, not the Takings Clause. *Id.* at 539-547. The dissent agreed that the question of retroactivity should be addressed under the Due Process Clause, but found that the statute was constitutional. The dissent concluded that it was not fundamentally unfair and unjust to require Eastern to pay the health care costs of its own retired employees because: (1) the statute only imposed liability on Eastern for miners which Eastern itself employed; (2) Eastern benefited from the miners labor and created the health risks of the miners; and (3) Eastern helped create the miners' expectations of continued future health benefits. 524 U.S. at 559-567.

First, in contrast, EPACT imposes liability for decontamination and decommissioning costs associated with the government's national defense programs. Second, Petitioners did not create the conditions requiring decontamination and decommissioning. As noted above, the government contaminated the facilities while enriching uranium for its own use and, in part, because of its own negligence. Moreover, Petitioners exercised no control over the facilities or the enrichment process. Third, Petitioners and the other utilities played no part in the government's expectation that it would be reimbursed by its contacting partners for these costs. In fact, because the contracts at issue

were fixed price contracts, the risk of increased costs was borne by the government as the seller of the services. *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1402 (9th Cir. 1993). Thus, even assuming that the more deferential standard of review applies, there can be no doubt that EPACT is unconstitutional. In sum, the Federal Circuit has given Congress a virtually unrestricted license to enact wholly retroactive legislation and for the singular purpose of improving the government's position in its pre-existing contracts. Given that the government, not Petitioners, created the problems addressed by EPACT, the imposition of retroactive liability on Petitioners is "arbitrary and irrational." As such, it cannot be sustained under the Due Process Clause.[3]

The Federal Circuit's decision invites Congress retroactively to impose price increases on many of the Chambers members and the government's other contracting partners.[4] Contractors must, however, know with a reasonable degree of certainty what risks they are undertaking

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[3] While the facts of *Eastern Enterprise* were susceptible of the different interpretations that led to the different conclusions reached by Justice Kennedy and the dissenting justices, the facts of this case are not. The facts clearly show the government entered into fixed price contracts and then acted in its own singular self-interest by shifting the financial burden of the decontamination and decommissioning costs associated with its operation of enrichment facilities from the public to the government's contract partners.

[4] By granting Congress the authority to disrupt settled expectations long after the transactions at issue have closed, the Federal Circuit's decision could impact not only the expectations resulting from the type of fixed-price contracts at issue here, but also the expectations derived from the government's acceptance of certain risks set forth in the assumption-of-risk clauses that the government has adopted as part of the FAR. See, for example, FAR, Part 50.

in agreeing to contract with the government so that those risks can be addressed appropriately. The failure by the government to account for these risks contractually compels the contractors to include substantial contingency costs in their pricing of contracts and increases greatly the ultimate costs to the government. *Boyle*, 487 U.S. at 507-512. This Court should grant certiorari to correct the grave errors by the Federal Circuit.

## E. THE PERVASIVE REGULATORY ENVIRONMENT REQUIRES STRICT ADHERENCE BY THE UNITED STATES TO ITS CONTRACT OBLIGATIONS

Substantial reliance for its decision is placed by the Circuit on the fact that the context of this case included a highly regulated business. It should have been the "reasonable expectation," said the Circuit, that the government would return and demand that the Petitioners participate in the cleanup of the government's contaminated facility. These conclusions, ill-founded in the reasoning and case law cited by the Circuit, are a fundamental denial of the law of contracts and, furthermore are even inconsistent with environmental law.

No case, not one, even suggests that an owner of a contaminated facility may, without a prior contract reservation, visit upon its former customers the costs of remediation of the facility. And, when the government is involved, this is also the case. Thus, where the government has been a predominant customer and has exercised plenary control even over a privately owned facility, the Circuits have found that the government is liable, at least as an "arranger." *See, FMC Corp. v. United States Department of Commerce*, 297 F.3d 833 (3d Cir. 1994); *cf. United States v. Shell Oil Co.*, 2817 F.3d 812 (9th Cir. 2002), Petition for rehearing en banc, pending).

But the more critical error of the Circuit lies in its pointed sidestepping of the contract relationship in concluding that pervasive regulation is the natural predicate to breaching the four walls of a contract. Such a notion is not supported by any case citation or logic path suggested by the Circuit. The cases imported by the Circuit for its analysis simply were not contract cases in which the government, as a contracting party, directly or indirectly either assumed or projected the costs of remediation. To the contrary, the analysis and the cases cited stand only for the unremarkable proposition that one cleans up one's own mess. In the instant case, the "mess" was not only owned exclusively on the government, it was created exclusively by the government. What is quite remarkable in this analysis is the suggestion that the Petitioners' generic admission that their industry always carried a D&D burden could be applied to facilities that were never owned nor controlled by the industry. There is no doubt that this industry is well aware of its remediation burdens. Those burdens are substantial enough when viewed simply from the perspective of the facilities that the industry owns and controls. But, those facts hardly suggest that the industry should have anticipated assuming the government's burden too.

## III. CONCLUSION

The capstone on these poorly constructed notions by the Circuit is its failure even to acknowledge the presence of contractual agreements in which the government, as a contracting party, had purposefully excepted from the contract price and the negotiations for such contracts any undertaking to participate in the D&D. This fact requires us to return to the basic premise of these Petitions: the government is bound by its contracts, fully, as would be any other contracting party. Under the facts in this case, it is hardly necessary even to reach the subtle concepts of sovereign acts or unmistakability because the objectives

which those notions would reach, the imposition of D&D costs on the contracting Petitioners, were actually considered and rejected in the making of the contracts themselves. At its root, this case involves little more than the sanctity of a contract in the face of an after-discovered effort to entrap the private contracting parties in a poorly orchestrated effort to rewrite the contracts include obligations that would have been rejected in the first place.

To the extent that this Court's decision in *Winstar* appeared to leave open a window to enable the government to pass contract and program specific laws reopening purposefully fixed terms, that window should be closed. There was no material public interest served here that would warrant a precedent disturbing the sanctity of these contracts; this precedent should not be allowed to stand.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

COMMONWEALTH EDISON CO.,
*Petitioner*,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

## REPLY BRIEF FOR THE PETITIONER

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## REPLY BRIEF FOR THE PETITIONER

The Petition demonstrated that EPACT imposes the most severe retroactive exaction in this Nation's history, requiring a group of utilities to pay billions of dollars (and petitioner alone over $235 million) based on events that occurred decades ago. The fundamental injustice of this scheme is patent – the assessments (i) "are not premised upon any responsibility [by the utilities] for the contamination" (Gov't C.A. Br. 31) but rather finance an environmental clean-up necessitated by the government's own negligence, (ii) subsidize the government's self-interested sale of USEC, and (iii) fund a clean-up of thorium and uranium production sites (costing more than $400 million) unrelated to any conduct by the utilities. For its part, the *en banc* Federal Circuit's exceedingly lenient test for evaluating even "severely retroactive" exactions (Pet. App. 31a) has considerable significance beyond even this seminal case and the dozens of parallel challenges to EPACT pending in the lower courts because the Federal Circuit has claimed exclusive jurisdiction over innumerable challenges to retroactive legislation that inevitably will arise in the future.

The Solicitor General denies little if any of this. Instead, like the Federal Circuit, he defends EPACT's constitutionality principally by segregating petitioner's takings claim from its due process claim in an attempt to deprive this Court's judgment in *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), of any force. But the government, by focusing on the disagreement between the plurality and Justice Kennedy in *Eastern Enterprises* over which clause of the Fifth Amendment was violated by the Coal Act, ignores the vital, common conclusion reached by a majority of the Court: that the Constitution requires careful scrutiny of severe retroactive exactions such as EPACT. Certiorari is essential in order to give effect to that holding. See Pet. 12-15. And review is warranted for several other reasons as well, including the undisputed conflict between the Federal Circuit's *per se*, two-part test under the Due Process Clause and decisions of other circuits adopting an "*ad hoc* and fact intensive" test (*United States* v. *Hercules, Inc.*, 247 F.3d 706, 722 (CA8 2001)). See Pet. 15-16, 22-29.

Because this Petition squarely presents the vital constitutional issues raised by the Federal Circuit's *en banc* decision sustaining EPACT, certiorari should be granted limited to Questions One and Two. The equally important contract issues raised by EPACT should be given full consideration by also granting certiorari limited to Question One in No. 01-1398, *Omaha Public Power District* v. *United States* ("*OPPD*"), and setting the cases for argument in tandem.

**I. The Conflicts Created By The Federal Circuit's Legal Standard Warrant Review In This Court.**

1. The EPACT assessment takes petitioner's property for public use without compensation, and this case in no way requires this Court to revisit the determination of five Justices in *Eastern Enterprises* that the Takings Clause does not apply to "a mere obligation to pay an undifferentiated amount of money" (contra BIO 13).[1] The BIO ignores the fact that the assessments not only are "measured by [petitioner's] property interest" (*Eastern Enters.*, 524 U.S. at 540 (Kennedy, J., concurring)) in the Separative Work Units it purchased but also attach as a matter of law to the uranium itself. See Pet. 13. The Solicitor General's response to the further fact that EPACT "takes" the discrete stream of money that the statute contemplates the utilities will attempt to recover from ratepayers is internally inconsistent. He maintains (at 15-16) that "the utilities are generally liable for EPACT assessments without regard to whether the assessments are passed on to consumers and without reference to the source of the funds used to pay the assessments," while contending on the very next page (at 17)

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[1] It bears noting, however, that there is nothing "contrived" (contra BIO 14) about holding that, just as the Takings Clause would apply to a governmental order that a utility surrender a $2.25 billion power plant for public use, so too it applies to EPACT's mandate that a discrete group of utilities forfeit a specific sum of $2.25 billion apportioned according to a distinct set of contracts to finance a particular governmental project. The government equally "appropriates private property interests to serve the public good" (*id.*) in both instances.

that no constitutional claim lies because EPACT "mandate[es] that a utility 'shall' be allowed to fully recover the special assessments from its ratepayers." The better view is that Congress envisioned that the utilities would be required to forfeit a specific stream of money to the federal government. On the Solicitor General's contrary view, the government may seize the value of any discrete fund of money at its whim, circumventing the Takings Clause through the obvious artifice of mandating that payment be made from general revenues.

2. The grounds for granting certiorari to review the Federal Circuit's *per se*, two-part test under the Due Process Clause are even stronger. From the outset, the government does not deny that the *en banc* Federal Circuit avowedly created a circuit split by rejecting the "*ad hoc* and fact intensive" inquiry of other circuits (Pet. App. 20a n.10 (rejecting *United States* v. *Hercules, Inc.*, 247 F.3d 706, 722 (CA8 2001))). See generally Pet. 16 (collecting cases).[2] The Petition (at 22-29) demonstrated that the Federal Circuit – by considering only the "benefit" received and the assessed party's expectations – assigns no weight to at least *seven* factors that decisions of this Court and of other circuits hold to be highly relevant. The conflict is so manifest that the Solicitor General is unable to offer any answer at all regarding at least four of these factors:

• In assigning no weight to the severity of the assessment – *i.e.*, how much money the government exacts – the decision below conflicts with *United States* v. *Hemme*, 476 U.S. 558 (1986), and Third Circuit precedent. See Pet. 24-25. The Solicitor General thus acknowledges in his factual recitation (at 5) that EPACT requires utilities to pay $2.25 billion, but then refuses to admit that this vital fact plays any part in the constitutional analysis. Manifestly, the size of the exaction is central to determining whether it is "proportionate" to the assessed party's experience and responsibility.

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[2] The BIO (at 18) addresses the conflict only with respect to the Takings Clause, apparently conceding it with respect to the proper test under the Due Process Clause.

• The Federal Circuit's test assigns no weight to the fact that an assessment is wholly retroactive, with the concomitant risk that it is targeted at an unpopular or captive payor. The EPACT assessments rest only on events that occurred long ago and do not apply to future enrichment contracts. This Court's principal precedents applying rationality review in this context, by contrast, involved the "retroactive *application*" (*PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) (emphasis added)) of statutes that apply equally prospectively. See Pet. 26-27.

• Particularly important with respect to EPACT, the Federal Circuit's test deems the government's patent self-interest in imposing the assessment totally irrelevant. See Pet. 27-28. Notwithstanding the availability of "numerous options to finance the decontamination and decommissioning of uranium enrichment facilities" (BIO 4), Congress chose the one that maximized the profits from the government's sale of USEC. In refusing even to acknowledge that critical fact, the BIO ignores not only Justice Kennedy's reminder that heightened scrutiny applies to "the Government's self enrichment" (*Eastern Enters.*, 524 U.S. at 544), but also the manifest conflict between the decision below and such precedents as *United States* v. *James Daniel Good Real Property*, 510 U.S. 43 (1993), and *U.S. Trust Co.* v. *New Jersey*, 431 U.S. 1 (1977), and its progeny, as well as decisions of the Ninth and Tenth Circuits. Nor does he dispute that, because this case arises from the enrichment contracts, it presents an ideal opportunity to resolve the still-unanswered question expressly left open by *National Railroad Passenger Corp.* v. *Atchison, Topeka & Santa Fe Railway Co.*: "whether an allegation of a governmental breach of its own contract warrants application of [a] more rigorous standard" under the Due Process Clause. 470 U.S. 451, 471 (1985). Accord Chamber *Amicus* Br. 15 (urging that certiorari be granted to decide "what level of scrutiny applies where Congress has legislated for its own benefit").

• The Federal Circuit's test assigns no weight to whether the statute provides the assessed party with any procedural protections (including particularly resort to a neutral judicial officer, as is true of CERCLA and was true in *Usery* v. *Turner*

*Elkhorn*, 428 U.S. 1 (1976)) or instead, like EPACT, leaves the exaction wholly in the hands of the Executive Branch, which as noted stands to profit considerably from it. Pet. 29 & n.22.

The BIO does briefly address three factors that the decision below holds irrelevant, but the government still provides no persuasive argument that the Federal Circuit's *per se* test can be reconciled with the decisions of this Court and of other circuits:

• The government (at 23) deems EPACT's extraordinary period of retroactivity – potentially reaching from the final payments in 2007 back to the 1950s and 1960s (contra *id.* (asserting without citation a period of thirty-three years)) – to be "less important." Not so: the very notion of "settled" expectations in this Court's retroactivity jurisprudence necessarily places considerable weight on that factor, and this Court's precedents confirm how important it is whether Congress employs "only a modest period of retroactivity." *United States* v. *Carlton*, 512 U.S. 26, 32 (1994). See also Pet. 23 (citing *Eastern Enters.*, *supra*; *McKesson Corp.* v. *Division of Alcoholic Bev. & Tob.*, 496 U.S. 18 (1990)). Other circuits, in square conflict with the *en banc* Federal Circuit's decision in this case, have followed this Court's precedents and "place[] *considerable weight* on the brevity of the period of retroactivity" (*Licari* v. *Commissioner*, 946 F.2d 690, 694 (CA9 1991) (emphasis added)). See generally Pet. 24 (collecting decisions from Second, Third, Fifth, Seventh, and Ninth Circuits). The Solicitor General fails even to attempt to articulate a single basis on which those decisions can be distinguished or any reason why the conflict does not merit review.

• The Federal Circuit's test holds it irrelevant whether the assessed party is responsible for the problem that Congress seeks to redress. See generally Pet. 25. The Solicitor General maintains that the *Eastern Enterprises* plurality "expressed no doubt that *receipt of a benefit* is a rational basis for the imposition of retroactive liability to address a societal problem associated with that benefit." BIO 25 (emphasis added). Not so. Both the plurality and Justice Kennedy focused on the fact that the coal operators in that case were not responsible for *creating* the employees' *expectation* of lifetime health benefits. See 524

U.S. at 530-31 (plurality); *id.* at 549 (Kennedy, J.). It is therefore critical that the government has conceded that the EPACT "assessments are not premised upon any responsibility [by the utilities] for contamination" (Gov't C.A. Br. 31) and furthermore that the utilities "had no control" (*Eastern Enters.*, 524 U.S. at 532 (plurality)) over the government's enrichment facilities. See also *infra* at 8 (addressing Solicitor General's reliance on "benefit" supposedly received by utilities).

• Although this Court's decisions have sustained retroactive legislation only in limited circumstances (see Pet. 25), the Federal Circuit's test holds that even the most severe exactions are appropriate in order to address any "societal problem" (Pet. App. 31a). The Solicitor General again offers only contradictions in asserting that retroactive legislation was required here: on the one hand, he maintains (at 18) that "it has long been understood that the enrichment process would leave a need for decontamination" while just three pages later he insists (at 21) that the "cost of decontamination was not anticipated at the time the government provided those enrichment services" and that the need for decontamination was a "'large, unrecognized societal problem[]'" (quoting *Yankee Atomic Elec. Co.* v. *United States*, 112 F.3d 1569, 1575 n.6 (1997), *cert. denied*, 524 U.S. 951 (1998)). The truth of the matter is that the need for decontamination has long been known (see J.A. 524-25; A.S.A. 282), such that the fixed-price contracts both (i) assigned those production costs to the government as the supplier, and (ii) created, in turn, a reasonable expectation on the part of utilities that the costs would not later be shifted onto them.

3. Of particular note, most of the just-cited considerations that the Federal Circuit held to be irrelevant distinguish this case from the decision on which the court of appeals and the Solicitor General principally rely – *Usery* v. *Turner Elkhorn*, 428 U.S. 1 (1975). The worker's compensation provision in *Turner Elkhorn*: (i) imposed nothing remotely approaching the multi-billion dollar liability at issue in this case; (ii) subjected the mine owners to liability because they were principally responsible for the miners' illnesses (as the result of the mine conditions), and thus "allocate[d] to the mine operator

an actual, measurable cost of his business" (428 U.S. at 19), in contrast to EPACT, which abrogates fixed-price enrichment contracts and ignores the government's responsibility for the pollution in question; (iii) was not purely retroactive but rather only had "some retrospective effect" (indeed, the statute's retrospective application was so minor that the government denied it occurred *at all*) (*id.* at 16 & n.14); (iv) was not a self-interested attempt to fill the government's own coffers, but rather only served to aid injured workers; and (v) provided substantial procedural protections to coal companies challenging their liability (*id.* at 10-12). And even *Turner Elkhorn* explicitly left open the constitutionality of requiring coal operators "to provide compensation for present employees whose disabilities may stem from exposure that was terminated before enactment of the Act" (*id.* at 16 n.15), a circumstance analogous to this case, in which EPACT's adoption long post-dates the government's enrichment services.[3]

Certiorari accordingly should be granted to resolve the conflicts created by the Federal Circuit's adoption of a *per se*, two-part test for evaluating retroactive exactions.

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[3] The Solicitor General's further reliance (at 24) on CERCLA's retroactivity is misplaced because no court has imposed liability under circumstances remotely similar to this case. The one case the government cites – *United States* v. *Monsanto Co.*, 858 F.2d 160, 173-74 (CA4 1998), *cert. denied*, 490 U.S. 1106 (1989) – involved liability of less than $2 million reaching back approximately one decade, and even then the court of appeals sustained the statute only because it "spread[s] the costs * * * among all the parties that played a role in creating the hazardous conditions." In a recent decision far more analogous to the facts here, the Ninth Circuit held that the "primary" customer of aviation fuel suppliers could not be held liable under CERCLA for hazardous wastes associated with production. The court ruled that the customer (there, the government) had no control over the production process and CERCLA liability did not extend to mere end purchasers of hazardous products. *United States* v. *Shell Oil Co.*, 281 F.3d 812, 822-26 (CA9 2002). This decision, like those cited in the Petition (at 21 n.17), establishes that even CERCLA does not impose the sweeping liability without regard to responsibility that is at issue here.

**II. The Solicitor General's Arguments With Respect To The Two Factors That The Federal Circuit Held To Be Relevant Are Similarly Unavailing.**

Because the standard adopted by the Federal Circuit fails to account for several vital considerations under the Due Process Clause (see *supra* Part I), the Solicitor General's defense of the court of appeals' conclusion that EPACT is not "severely disproportionate" to the "benefit" the utilities received and does not contravene the utilities' reasonable expectations is largely beside the point. But the government's argument is also wrong on the merits.

1. The Solicitor General opines (at 21) that EPACT is constitutional because utilities received the "benefit" of "below-market pricing" for enrichment services and of "avoid[ing] the even greater costs of" operating and decontaminating their own plants. Even the Federal Circuit did not accept those claims, recognizing that the actual facts are to the contrary. Indisputably, the government was the "world's highest priced" supplier of enrichment services and when faced with the prospect of losing business to foreign competitors as a result of its *above*-market prices, it responded by making firm promises to charge less. See Pet. 3; J.A. 533, 585. The alternative foreign suppliers would have been powerless to exact a retroactive decommissioning fee. The Federal Circuit accordingly concluded that the "benefit" received by the utilities was merely the enrichment services themselves. As the Petition demonstrated (at 10) and the Solicitor General does not dispute, that reasoning effectively describes *every* government contract.

Nor did the utilities even arguably receive a "benefit" from the thorium and uranium processing sites that are being cleaned up with more than $400 million from the EPACT fund. Not even the Federal Circuit accepted the Solicitor General's contention (at 24 n.11) that the utility assessments are not used for that purpose. The BIO's claim (at 24 n.11) that "the monies for cleaning up the thorium and uranium processing sites are to be drawn from the government's contributions to the Fund" is not reflected in the statutory scheme and is belied by testimony by DOE that spending from the EPACT fund is zero-sum. See

A.S.A. 180 (money spent on thorium/uranium sites reduces the amount available for remediation of the enrichment plants). The Solicitor General's argument thus reduces to the insupportable proposition that any assessment is valid no matter what its purpose so long as it is pooled with other money contributed by the government.

The government's further contention that the assessments are "proportionate" because they are measured by the enrichment contracts once again encompasses every government contract. More important is the fact that the assessments are not proportionate to the utilities' *responsibility* for the environmental contamination, which resulted only from the government's operation of its own plants. Nor did Congress determine "that the costs should be borne collectively by all of those entities whose uses of the enrichment services would have contributed to the contamination of the enrichment facilities, in proportion to the benefit the entity received from those enrichment services." Contra BIO 26. Even if the government's contributions accounted for its own use of the plants for military purposes, the statute assigns the government essentially no costs for its commercial enrichment, notwithstanding that it was only the government that controlled whether the plants were operated in an environmentally responsible fashion. See Comm. on Energy *Amicus* Br. 11-12 n.5. That scheme cannot be reconciled with even CERCLA's approach of allocating costs based upon "relative fault." Pet. 21; *supra* at 7 n.3.

2. Nor is there merit to the BIO's claim (at 22) that the EPACT assessments can be reconciled with the utilities' reasonable expectations because the enrichment contracts lacked a provision specifically promising that the government would not retroactively force the utilities to pay for decontamination. The Solicitor General's position is wrong as a matter of basic contract law: the parties understood that the government would incur an array of costs that were covered by the prices paid by the utilities. Settled law established that those prices also accounted for the risk – attributed to the government as the supplier – that further unexpected costs would arise. See *OPPD* Pet. 14 (citing *Spearin* v. *United States*, 248 U.S. 136 (1918)).

And the Solicitor General notably does not deny that his position eviscerates private parties' faith that their contracts can successfully assign costs to the government, for it is undisputed that government contracts (which generally are prepared by the government itself) *uniformly* lack the further guarantee against retroactive liability that both the Federal Circuit and the Solicitor General find critically lacking in this case. See *id.* at 17.

The Solicitor General's further recitation of the Federal Circuit's view that CERCLA and the common law of nuisance "telegraphed" (Pet. App. 23) the EPACT assessment (see BIO 22) was fully anticipated by the Petition. The decision below ignores this Court's expectations jurisprudence, which holds that such a dramatic premise of telegraphy must be "objectively reasonable." See Pet. 19. It furthermore conflicts with *Eastern Enterprises*, which rejected the government's contention that the history of worker's compensation legislation and the Court's own decision in *Turner Elkhorn* deprived coal companies of any expectation against retroactive liability. See *id.* 20. And the EPACT scheme differs significantly from the apportionment of liability under CERCLA. See *supra* at 7 n.3, 9; Pet. 21-22.

Finally, there is no substance behind the government's *ipse dixit* (at 18) that "the strict regulation of the industry put [utilities] on notice that they could be liable in the future for assessments like those at issue here." Legions of industries, including the coal industry in *Eastern Enterprises*, are "highly regulated." See Pet. App. 175a-79a. The more relevant point is that the only relevant regulations – those governing uranium enrichment – placed responsibility for that process exclusively in the hands of the government. See Pet. 20.

## CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted limited to Questions One and Two and the case set for argument in tandem with No. 01-1398, *Omaha Public Power District* v. *United States*.

Respectfully submitted,

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